Central Law Journal.

ESTABLISHED JANUARY, 1874.

VOL. 38 ST. LOUIS, MO., JANUARY 19, 1894. No. 3

Central Law Journal.

A LEGAL WEEKLY NEWSPAPER.

Published by

Central Law Journal Company,

919 OLIVE ST., ST. LOUIS, MO.

To whom all communication should be addressed.

Subscription price, FIVE DOLLARS per annum, in advance. Single numbers, TWENTY-FIVE CENTS.

Entered at the post-office, St. Louis, Mo., as second-class matter.

CONTENTS.

Notice to Central Law Journal Readers.

A full report of any decision referred to in the WEEKLY DIGEST of the CENTRAL LAW JOURNAL, excepting the St. Louis and Kansas City Courts of Appeal, will be furnished on instant notice, for 25 cents, if the case is from a State Court, or for 50 cents, if from a United States Court. In ordering by mail or telegraph, be careful to give the title of the case, as well as the volume and page of the Reporters from which it is cited.

WEST PUBLISHING CO., ST. PAUL, MINN.

Central Law Journal.

ST. LOUIS, MO., JANUARY 19, 1894.

A correspondent calls our attention to an error of statement by the Supreme Court of the United States in the recent case of Union Pacific R. R. Co. v. Botsford, 141 U. S. 250 (33 Cent. L. J. 362). In that case which involved the question as to the power of the court to order an inspection of the body in a personal action the court uses this language: "So far as the books within our reach show, no order to inspect the body of a party in a personal action appears to have been made or ever moved for, in any of the English courts of common law, at any period of their history."

The Supreme Court seem to have overlooked the case of Friend v. The London, Chatham, and Dover R. R. Co., in the Court of Appeal before Cockburn, C. J., Brammell, L. J., and Brett, L. J. (46 L. J. 696), where it appears that in the trial of that case in the court below the court made an order, at the instance of the railway company, requiring the plaintiff to submit to a personal examination by the railway company's physician, to enable him to testify in the trial of a cause, and Cockburn, C. J., said: "The order for such an examination was clearly *ultra vires*." Our Supreme Court also appeared to have overlooked in their research Sec. 26, Chap. 119, 31 and 32 Vict., which says: "Whenever any person injured by an accident on a railway claims compensation on account of the injury, any judge of the court in which proceedings to recover such compensation are taken, or any person who, by the consent of the parties, or otherwise has power to fix the amount of compensation, may order that the person injured may be examined by some duly qualified medical practitioner named in the order, and not being a witness on either side." In Skinner v. The Great Northern Railway Company, decided by Brammel, B., Court of Exchequer (43 L. J. 150), it is held that where a railway company has procured an order under the above statute for such an examination, that the report of its physician was privileged and the plaintiff not entitled to an order of court allowing its inspection. This opinion was followed in the Court of Appeal in the above case, where the latter court seems to interpret the statute as only giving the railway company the right to examine the plaintiff so as to put both parties on an equal footing, and in furtherance of compromise settlements.

An order which has attracted some attention by reason of its novelty, was recently issued by United States Circuit Judge Caldwell, at St. Paul in the case of the receivership of the Northern Pacific Railroad Company. The order was directed to the officers agents and employees of the receiver and to the engineers, firemen, trainmen, train dispatchers, conductors and switchmen and ordered each of them and all persons, associations and combinations, voluntary or otherwise, whether employees of the receivers or not, and all persons generally, to refrain from disabling or in any way rendering unfit for convenient or immediate use any engines, cars or other properties of the receivers, and generally from interfering with the officers and agents of said receivers or their employees in any manner by actual violence or by intimidation, threats or otherwise, in the full and complete possession and management of the railroad, and of all the property thereunto pertaining, and from interfering with any property in the custody of the receivers, whether belonging to the receivers or shippers, or other owners, from interfering, intimidating or otherwise injuring or inconveniencing or delaying the passengers being transported or about to be transported over the railroad or any portion thereof by the receivers, or interfering in any manner by actual violence or threats, or otherwise preventing or endeavoring to prevent the shipment of freight, or the transportation of mails of the United States, over the road operated by the receivers, until the further order of this court.

NOTES OF RECENT DECISIONS.

HUSBAND AND WIFE—ESTATES—ENTIRETIES—JOINT TENANCY.—In Thornburg v. Wiggins, 34 N. E. Rep. 999, the Supreme Court of Indiana, decide that though where a conveyance is made to husband and wife jointly, without limiting words, they take an estate by entireties, yet if the conveyance is to them expressly "in joint tenancy" they take as joint tenants. Dailey, J., says:

A joint tenancy is an estate held by two or more persons jointly, so that during the lives of all they are equally entitled to the enjoyment of the land, or its equivalent, in rents and profits; but upon the death of one his share vests in the survivor or survivors until there be but one survivor, when the estate becomes one in severalty in him, and descends to his heirs upon his death. It must always arise by purchase, and cannot be created by descent. Such estates may be created in fee, for life, or years, or even in remainder. But the estate held by each tenant must be alike. Joint tenancy may be destroyed by anything which destroys the unity of title. Our law aims to prevent their creation, and they cannot arise except by the instrument providing for such tenancy. Griffin v. Lynch, 16 Ind. 398. 9 Amer. & Eng. Enc. Law, 850, says: "Husband and wife are, at common law, one person, so that when realty vests in them both equally, · · · they take as one person; they take but one estate, as a corporation would take. In the case of realty, they are seised, not *per my et per tout*, as joint tenants are, but simply *per tout;* both are seised of the whole, and, each being seised of the entirety, they are called 'tenants by the entirety,' and the estate is an estate by entireties. · · · Estates by entireties may be created by will, by instrument of gift or purchase and even by inheritance. Each tenant is seised of the whole; the estate is inseverable, cannot be partitioned; neither husband nor wife can alone affect the inheritance; the survivor takes the whole." This tenancy has been spoken of as "that peculiar estate which arises upon the conveyance of lands to two persons who are at the time husband and wife, commonly called 'estates by entirety.'" As to the general features of estates by entireties there is little room for controversy, and there is none between counsel. Our statutes re-enacts the common law. Arnold v. Arnold, 30 Ind. 305; Davis v. Clark, 26 Ind. 424. Strictly speaking, estates by entireties are not joint tenancies (Chandler v. Cheney, 37 Ind. 391; Hulett v. Inlow, 57 Ind. 412); the husband and wife being seised, not of moieties, but both seised of the entirety *per tout*, and not *per my* (Jones v. Chandler, 40 Ind. 589; Davis v. Clark, *supra;* Arnold v. Arnold, *supra*). It has been said by this court in some of the earlier decisions that no particular words are necessary. A conveyance which would make two persons joint tenants will make a husband and wife tenants of the entirety. It is not even necessary that they be described as such, or their marital relation referred to. Morrison v. Seybold, 92 Ind. 302; Hadlock v. Gray, 104 Ind. 596, 4 N. E. Rep. 167; Dodge v. Kinzy, 101 Ind. 102; Hulett v. Inlow, 57 Ind. 414; Chandler v. Cheney, 37 Ind. 395. But the court has said that the general rule may be defeated by the expression of conditions, limitations, and stipulations in the conveyance which clearly indicate the creation of a different estate. Hadlock v. Gray, *supra;* Edwards v. Beall, 75 Ind. 401. Having its origin in the fiction or common-law unity of husband and wife, the courts of some States have held that married women's acts extending their rights destroyed estates by entirety, but this court holds otherwise (Carver v. Smith, 90 Ind. 226); and the greater weight of authority is in its favor. Our decisions hold that neither alone can alienate such estate. Jones v. Chandler, *supra;* Morrison v. Seybold, *supra.* There can be no partition. Chandler v. Cheney, 37 Ind. 391. A mortgage executed by the husband alone is void (Jones v. Chandler, 40 Ind. 391); and the same is true of a mortgage executed by both to secure a debt of the husband (Dodge v. Kinzy, 101 Ind. 105); and the wife cannot validate it by agreement with the purchaser to indemnify in case of loss arising on account of it. State v. Kennett, 114 Ind. 160, 16 N. E. Rep. 173. A judgment against one of them is no lien upon it. Ditching Co. v. Beck, 99 Ind. 250; McDonnell v. Martin, 52 Ind. 434; Othwein v. Thomas (Ill. Sup.) 13 N. E. Rep. 564. Upon the death of one, the survivor takes the whole in fee. Arnold v. Arnold, *supra.* The deceased leaves no estate to pay debts (Simpson v. Pearson, 31 Ind. 1); and during their joint lives there can be no sale of any part on execution against either (Carver v. Smith, *supra;* Dodge v. Kinzy, 101 Ind. 105; Hulett v. Inlow, 57 Ind. 412; Chandler v. Cheney, *supra;* Davis v. Clark, *supra;* McConnell v. Martin, *supra;* Cox's Adm'r v. Wood, 20 Ind. 54). The statutes extending the rights of married women have no effect whatever upon estates by entirety. Carver v. Smith, 90 Ind. 223. Such estate is in no sense either the husband's or the wife's separate property. The husband may make a valid conveyance of his interest to his wife, because it is with her consent. Enyeart v. Kepler, 118 Ind. 34, 20 N. E. Rep. 539. The rule that husband and wife take by entireties was enacted in this territory in 1807, nine years before Indiana was vested with statehood, and has been repeated in each succeeding revision of our statutes. It has thus been the law of real property with us for 86 years. Section 2922, Rev. St. 1881, provides that "all conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following section, shall be construed to create estates in common, and not in joint tenancy, unless it be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear from the tenor of the instrument that it was intended to create an estate in joint tenancy." Section 2923 provides that the preceding section shall not apply to conveyances made to husband and wife. Under a statute of the State of Michigan, similar in all its essential qualities to our own, the court held that, "where lands are conveyed in fee to husband and wife, they do not take as tenants in common" (Fisher v. Provin, 25 Mich. 347); they take by entireties. Whatever would defeat the title of one, would defeat the title of the other. Manwaring v. Powell, 40 Mich. 371. They hold neither as tenants in common nor as ordinary joint tenants. The survivor takes the whole. During the lives of both, neither has an absolute inheritable interest; neither can be said to own an undivided half. Insurance Co. v. Resh, *Id.* 241; Allen v. Allen, 47 Mich. 74, 10 N. W. Rep. 113.

While the rule of entireties was predicated upon a fiction, the legislative intent in this State has always been to preserve this estate, and has continued the peculiar statute for this purpose. Estates by entireties have been preserved as between husband and wife, although joint tenancies between unmarried

persons have been abolished, so as to provide a mode by which a safe and suitable provision could be made for married women. Carver v. Smith, 90 Ind. 227. "Where a rule of property has existed for seventy years, and is sustained by a strong and uniform line of decisions, there is but little room for the court to exercise its judgment on the reasons on which the rule is founded. Such a rule of property will be overruled only for the most cogent reasons, and upon the strongest convictions of its incorrectness. · · · It is evident that the legislature of 1881 did not intend to repeal the statutes establishing tenancies by entireties. They simply intended to enlarge in some particulars the power of the wife, which existed already under the Acts of 1852 and the years following. · · · It did not abolish estates by entireties as between husband and wife, but provided that when a joint deed was made to husband and wife they should hold by entireties, and not as joint tenants or tenants in common." Carver v. Smith, *supra*. In Chandler v. Cheney, 37 Ind., on page 396, the court says: "It was a well-settled rule at common law that the same form of words which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entirety. The rule has been changed by our statute above quoted." The whole trend of authorities, however, is in the direction of preserving such tenancies, where the grantees sustain the relation of husband and wife, unless from the lauguage employed in the deed it is manifest that a different purpose was intended. Where a contrary intention is clearly expressed in the deed, a different rule obtains. "A husband and wife may take real estate as joint tenants or tenants in common, if the instrument creating the title use apt words for the purpose." 1 Prest. Est. 132; 3 Bl. Comm., Sharswood's note; 4 Kent. Comm., side p. 363; 1 Bish. Mar. Wom. § 616 *et seq.*; Freem. Coten. § 72; Fladung v. Rose, 58 Md. 13-24. "And in case of devise and conveyances to husband and wife together, though it had been said that they can take only as tenants by entireties, the prevailing rule is that, if the instrument expressly so provides, they may take as joint tenants or tenants in common." Stew. Husb. & Wife, §§ 307, 310; Tied. Real Prop. § 244. "And as by common law it was competent to make husband and wife tenants in common by proper words in the deed or devise," etc. (Hoffman v. Stigers, 28 Iowa, 310; Brown v. Brown (Ind. Sup.), 32 N. E. Rep. 1128.) "so it seems that husband and wife may by express words be made tenants in common by gift to them during coverture" McDermott v. French, 15 N. J. Eq. 80. In Hadlock v. Gray, 104 Ind. 599, 4 N. E. Rep. 167, a conveyance had been made to Isaac Cannon and Mary Cannon, who were husband and wife, during there natural lives, and the court say: "The language employed in the deed plainly declares that Isaac Cannon and Mary Cannon are not to take as tenants by entirety. The result would follow from the provision destroying the survivorship, for this is the grand and essential characteristic of such a tenancy. . . . The whole force of the language employed is opposed to the theory that the deed creates an estate in fee in the husband and wife." The court further say: "It is true that where real property is conveyed to husband and wife jointly, and there are no limiting words in the deed, they will take the estate as tenants in entirety. . . . But, while the general rule is as we have stated it, there may be conditions, limitations, and stipulations in the deed conveying the property which will defeat the operation of the rule. The denial of this proposition involves the affirmation, of the proposition that a grantor is powerless to limit or define the estate which he grants, and this would conflict with the fundamental principle that a grantor may for himself determine what estate he will grant. To deny this right would be to deny to parties the right to make their own contracts. It seems quiet clear upon principle that a grantor and his grantees may limit and define the estate granted by the one and accepted by the other, although the grantees be husband and wife." The court then adopts the language of Washburn (1 Washb. Real Prop. 674), and Tiedeman, *supra*. In Edwards v. Beall, *supra*, the court hold that when lands are granted husband and wife as tenants in common they will hold by moieties, as other distinct and individual persons would do. If, as contended by appellees, the rule prevail that the same words which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entireties, then it would result as a logical conclusion that husband and wife cannot be joint tenants, because by this rule, words, however apt or appropriate to create a joint tenancy, would, in a conveyance to husband and wife, result in an estate by entireties; joint tenancy would be superseded or put in abeyance by the estate created by law,—tenancy by entirety. The result of such reasoning would be to destroy the contractual power of the parties where this relationship between the grantees is shown to exist. Any other process of reasoning would carry the rule too far, and we must hold it modified to the extent here indicated. Husband and wife, notwithstanding tenancies by entirety exist as they did under the common law, may take and hold lands for life, in joint tenancy or in common, if appropriate language be expressed in the deed or will creating it; and we know of no more apt term to create a joint tenancy in the grantees in this estate than the expression "convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins in joint tenancy."

CARRIERS OF GOODS — INTERSTATE SHIPMENTS.—The Court of Civil Appeals of Texas in Texas & P. Ry. Co. v. Clark, decided that a shipment of freight over connecting lines from Missouri to a point in Texas by a bill of lading which provides that the receiving carrier shall only be liable for damage occurring on its own line, and which guaranties a through rate of freight to such point, is an interstate shipment, within the interstate commerce act; and, though the entire haul of the last connecting line is within the State of Texas, an overcharge by it on such shipment is a matter to be adjusted under the interstate commerce act, and not under the laws of Texas. Ramey, J., says:

The plaintiff's petition distinctly alleged, and the proof so shows, that the penalty claimed for the overcharge and discrimination was based on a through bill of lading executed by the Missouri, Kansas & Texas Railway Company to transport the freight therein mentioned from St. Louis, Mo., to Will's Point, in Van Zandt county, Tex. By the provisions of said bill of lading the Missouri, Kansas & Texas Railway Company was to deliver to connecting lines, and only be

liable for damages on loss occurring on its own line. A through rate of freight was guarantied to the point of destination. Said road connects with the Texas & Pacific Railway at Mineola, Texas, and the entire haul of the appellant's road was within the State of Texas. Article 4257, Rev. St., provides that railroads shall not charge a greater rate than "fifty cents per hundred pounds per hundred miles for the transportation of freight over their roads; that the rates shall be uniform and no unjust discrimination in the rates for transportation shall be made against any person or place," etc. Article 4258, *Id.*, prescribes a penalty of $500 for the violation of the provisions of said article 4257. Does the transaction under investigation come within the purview of the foregoing statute, or is it such a transaction that it comes within such regulation of commerce between the States as the Congress of the United States has the power only to make? In the leading case of Wabash, etc., Ry. Co. v. People of Illinois, 118 U. S. 557, 7 Sup. Ct. Rep. 4, the facts show that two shipments were made in Illinois over the same road to New York City. The railroad charged for one shipment 15 cents per 100 pounds, and for the other 25 cents, the freight in both instances being of the same class. In an action brought by one of the consignors against the road for unjust discrimination, under the the State of Illinois, which is similar to the statute of this State on the same subject, the court held that such were interstate shipments and did not fall within the regulations prescribed by the laws of Illinois. In Railway Co. v. Sherwood, 84 Tex. 125, 19 S. W. Rep. 455, the railway company received a lot of cotton at Greenville, Tex., to be by it carried on its lines in Texas, and forwarded to Liverpool, England, executing therefor a through bill of lading, though restricting liability to its own line. Said cotton was delivered by said railway company to the West India Pacific Steamship Company at Galveston, Tex. Suit was instituted against said company for loss. The only question raised in that case that is material in this was, was the shipment interstate or not? Justice Tarlton, in a very elaborate and well-considered opinion, held that it was an interstate shipment. In that case stress was laid upon the provision in the bill of lading that the railway company's liability should cease upon delivery to a connecting carrier, and that such delivery was made at Galveston, within this State; the shippers contending that these facts constituted a domestic shipment; that, as the cotton was not transported out of the State, and the railway's liability ceased upon delivery to a connecting carrier, it was in no sense a foreign shipment, but came exclusively within the laws of Texas. The court said: "The track of a railway company may extend beyond the limits of a State, yet if goods be carried by it from one point to another within this State, such carriage constitutes transportation within this State, and such railway is a carrier within this State. But if the railway, whether by itself or by its connecting lines, its agents, transports goods from a point within this State to a point within another State, it is a carrier, not within the State, but within and out of this State into another. In the latter event it is engaged in interstate commerce." There is no conflict on this point between the decision above mentioned and in the case at bar, except in those cases the freight was to be transported out of the State, while in this case the freight was coming from without to within the State. This, in principle, can make no possible difference. In the case of Dillingham v. Fischl, 1 Tex. Civ. App. 546, 21 S. W. Rep. 554, the St. Louis, Arkansas & Texas Railway Company received a lot of flour at St. Louis, Mo., to be transported to Texas by said line via the Gulf, Colorado & Santa Fe Railway Company to Brenham, at a certain rate. When the flour reached Corsicana, it was delivered to the Houston & Texas Central Railway, which transported it to Brenham. After reaching Brenham the consignee tendered the amount of freight specified in the bill of lading, and demanded the flour. The road refused to deliver unless a greater rate than that charged in the bill of lading was paid, which the consignee would not pay. After waiting awhile he sued the company for the penalty prescribed by the statute for detention of freight. The court said: "These facts show that the flour was interstate commerce, and that the defendant company and its connecting line, the said St. Louis, Arkansas & Texas Railway Company, were common carriers, engaged in carrying interstate freight, and were answerable to the laws of congress regulating interstate traffic." There can be no question, then, but that the transaction under consideration constitutes an interstate shipment. Is there anything, then, that will bring this case within the provisions of the statute under which this action was brought? We think not. The constitution of the United States vests in congress the power to regulate commerce between the States. This precludes the rights of the States to make any regulations in reference to the same whatever. We do not wish to be understood as holding that the States cannot make police regulations relative to interstate commerce within proper limitations. Justice Gaines, in Railway Co. v. Dwyer, 75 Tex. 572, 12 S. W. Rep. 1001, having under consideration the construction of the State statute prescribing a penalty for the detention of freight by the railroad, as to whether the same infringed the rights of congress to regulate commerce between the States, decided that such statute was a police regulation, and came within the scope of the State's authority. But he further said: "A State can make no law regulating the rate of freight for the carriage of goods between that and another State, although the regulation be construed as applying only to so much of the line of transit as lies within its own borders." The law under which the plaintiff in this case seeks to recover is for the purpose of regulating freight rates. It fixes the maximum rate that can be charged in this State by a railroad company. It prescribes a penalty for overcharge, and for unjust discrimination. This statute applies only to shipments between points within the State. To enforce it in this transaction would be an infringement upon the powers expressly delegated to congress in the regulation of commerce between the States. The Congress of the United States, it seems, thought it had jurisdiction of such commerce. Its act entitled "An act to regulate commerce," approved in 1887, and its amendments, provided that, after rates have been agreed to and fixed by carriers, they shall publish same, and furnish the interstate railway commission with such rates; and, after such rates have been thus established, and continuing in force, a higher or lower rate cannot be charged than that agreed upon and established, and for the violation of which fine and imprisonment are prescribed. It will thus be seen that if the statute of this State is enforced in such transactions as this it will be exercising jurisdiction in a matter over which congress has exclusive jurisdiction. For the reasons above set forth we are of the opinion that the appellee has no right to recover, and therefore this cause is reversed and remanded.

CORPORATION—OFFICERS—POWER TO ISSUE NOTES.—In Merchants National Bank v. Citizens Gaslight Co., it was decided by the Supreme Judicial Court of Massachusetts, that a corporation is liable on one of its notes in the hands of a *bona fide* purchaser before maturity where it is signed by an officer authorized generally to give notes in its behalf, though such officer, in signing the particular note in question exceeded his authority or the powers of the corporation and that the rule that the treasurer of a trading or manufacturing corporation is clothed by virtue of his office with the power to execute notes in behalf of the corporation so as to make them binding on it when in the hands of innocent purchasers before maturity, applies to gaslight companies, the business of which requires the use of credit at certain seasons of the year. Field, C. J., and Allen, J., dissent from the latter proposition. Barker, J., says:

As the plaintiff discounted this note before maturity, "in the usual course of its business, without notice or knowledge of any defect or infirmity," and as its good faith is not questioned, if the note were signed by an officer authorized generally to give notes in its behalf the defendant company would be liable, although the agent in signing this particular note exceeded his authority, or the powers of the corporation. Monument Nat. Bank v. Globe Works, 101 Mass. 57. It is not necessary that the authority of an officer or agent to sign notes in behalf of a corporation should appear in the by-laws, or should have been expressly given by a vote of the directors or of the stockholders. In Lester v. Webb, 1 Allen, 34, it was said: "The rule is well settled that if a corporation permit their treasurer to act as their general fiscal agent, and hold him out to the public as having the general authority implied from his official name and character, and by their silence and acquiescence suffer him to draw and accept drafts, and to indorse notes payable to the corporation, they are bound by his acts done within the scope of such implied authority. Fay v. Noble, 12 Cush. 1; Williams v.Cheney, 3 Gray, 215; Conover v. Insurance Co., 1 N. Y. 290. On the facts proved at the trial the plaintiff might well claim, if the jury believed the evidence, that the treasurer had authority to indorse the notes in suit, derived, not from any express direction, but from the course of conduct and dealing of the treasurer with the knowledge and implied assent of the directors of the corporation." See, also, McNeil v. Chamber of Commerce, 154 Mass. 285, 28 N. E. Rep. 245; Mining Co. v. Anglo-Californian Bank, 104 U. S. 192.

But cases where the actual authority of an officer is inferred from a course of business known to and permitted by the stockholders or the directors of a corporation do not touch the question whether authority is to be implied as matter of law from the name and nature of the office itself. In the present case the jury were instructed that the treasurer of such a corporation as the defendant company has by virtue of his office authority to sign a note which shall bind the corporation, and the defendant contends that this instruction was incorrect. The incidental powers of some officers or agents have become so well known and defined, and have been so frequently recognized by courts of justice, that certain powers are implied as matters of law in favor of third persons who deal with them on the assumption that they possess these powers, unless such persons are informed to the contrary. The officers and agents usually mentioned in this category are auctioneers, brokers, factors, cashiers of banks, and masters of ships. See Merchants' Bank v. State Bank, 10 Wall. 604; Case v. Bank, 100 U. S. 446. Treasurers of towns or cities in this commonwealth are well-known officers, and their powers are very limited. They are in general to receive, keep, and pay out money on the warrant of the proper officers of the towns and cities. Treasurers of business corporations usually have much more extensive powers, and the decisions of this court hold that the treasurer of a manufacturing and trading corporation is clothed by virtue of his office with power to act for the corporation in making, accepting, indorsing, issuing, and negotiating promissory notes and bills of exchange, and that such negotiable paper in the hands of an innocent holder for value, who has taken it without notice of any want of authority on the part of the treasurer, is binding on the corporation, although with reference to the corporation it is accommodation paper. Narragansett Bank v. Atlantic Silk Co., 3 Metc. (Mass.) 382; Bates v. Iron Co., 7 Metc. (Mass.) 224; Fay v. Noble, 12 Cush. 1; Lester v. Webb, 1 Allen, 34; Bank v. Winchester, 8 Allen, 109; Bird v. Daggett, 97 Mass. 494; Monument Nat. Bank v. Globe Works, *ubi supra;* Corcoran v. Cattle Co., 151 Mass. 74, 23 N. E. Rep. 727. While it is possible that most, if not all, of the cases in which this rule has been stated as law have some special circumstances from which the treasurer's authority could be inferred, and that the court was influenced in the decisions by the well-known fact that in many of the manufacturing corporations of this commonwealth the treasurer not only has the custody of the money, but is the general financial manager, and often the general business manager, of the corporation, the rule itself has been frequently and broadly stated in our decisions, and is well known both to the officers of manufacturing and trading corporations and to those of banks and financial institutions. It could not now be abrogated or unsettled without disturbing commercial transactions. There are, however, many corporations which transact more or less business to which the rule has been held not to apply. Thus it does not apply to a college (Weber v. College, 23 Pick. 302); nor to a parish (Packard v. Society, 10 Metc. (Mass.) 427); nor to a monument association (Torrey v. Association, 5 Allen, 327); nor to a municipality (Bank v. Winchester, 8 Allen, 109); nor to a savings bank (Tappan v. Bank, 127 Mass. 107); nor to a horse-railroad company (Craft v. Railroad Co., 150 Mass. 207, 22 N. E. Rep. 920). Upon consideration of the decisions cited, we think it fair to say that the making and indorsing of negotiable paper is to be presumed to be within the power of the treasurer of a manufacturing and trading corporation whenever from the nature of its ordinary business as usually conducted the corporation is naturally to be expected to use its credit in carrying on commercial transactions. Such paper is the usual and ordinary instrument of utilizing credit in commercial transactions, and it is for the interest of the corporation and of the community that the best instrument should be employed. It is no less for the interest of all that, if negotiable paper is to be em-

ployed, its validity should not be open to objections which would impair its usefulness by requiring at every step an inquiry into the authority by which it is issued. There are matters of common knowledge pertinent to the present question. Gaslight companies like the defendant are chartered for the purpose of making and selling gas. They are located in every city of the commonwealth, and in most of the larger towns and villages. In the recent development of the use of electricity many electric light or light and power companies have been established where gaslight companies are in operation. The powers, obligations, and business of these electric companies are so similar to those of gaslight companies that they are classed with them in the minds of businss men, and are under the supervision of the same state board. We see no reason why, in respect to the present question, all of this general class of corporations should not be governed by one rule. They are all in fact "manufacturing and trading corporations" in the same sense that companies whose business it is to manufacture and sell cottons, woolens, shoes, or paper are manufacturing and trading corporations. None of these companies are traders in the strict sense contended for by the defendant, since none of them make it their "business to buy merchandise or goods and sell the same." All of them, and the gaslight companies equally with the others named, buy merchandise and goods in large amounts, expend large sums in transforming by their processes of manufacture the articles purchased into other commodities which they sell for the purpose of making a profit. Neither the fact that pipes which a gaslight company uses only to deliver to its customers one of the commodities which it sells, nor that its price for that commodity may be regulated by civil authority, nor that the municipality in which its plant is located may purchase or take its franchise and property, makes it less advantageous or necessary that the gaslight company shall be able to use its credit in its commercial dealings.

Although such companies manufacture only as they deliver, and so have no occasion to hold large quantities of manufactured goods for a market, there are features of their business which make it necessary for them to have control of large amounts of money at certain seasons. Coal, their chief raw material, is uniformly at its lowest price in the summer, and away from the seaboard is usually taken in in large quantities at that season. Gas is uniformly sold upon time, and the bills collected monthly or quarterly. The work of extending and repairing street mains and other work upon the manufacturing plant can be done to the best advantage during only a portion of the year. A business so conducted affords abundant scope for the advantageous use of the credit of the corporations engaged in it, and they would naturally be expected to use their credit in the transaction of their ordinary business. Their published returns made to the board of gas commissioners show that the companies do in fact issue large amounts of promissory notes. It is true that these notes may possibly have been issued under special votes or by-laws or other explicit authority. Upon this point we have no evidence or means of certain knowledge. But it is also true, and is a consideration entitled to weight, that the practice of gaslight companies to issue promissory notes has grown up since the announcement by the court of the rule that treasurers of manufacturing and trading corporations are presumed to have authority to issue such notes; and again, the gaslight companies are in fact manufacturing and trading corporations. The strong inference is that the gaslight companies and their officers, and those who have received in payment or bought or discounted their promissory notes, have in so doing acted upon the assumption that the rule as to the implied authority of treasurers of manufacturing and trading corporations to issue negotiable paper applied to the treasurers of gaslight companies. Those who have occa sion to deal directly with such companies, or to purchase or discount their notes in the money market would naturally assume that the rule so long applied by the court to other manufacturing and trading corporations would be applied to these. In our opinion, the same reasons which required the making of the rule referred to are operative here, and requires us to hold that it is to be applied in the case of gaslight companies. We do not disregard the fact that such companies have peculiar duties to the public, and peculiar privileges, and that their operations may be regulated by public authority, and their franchises and property taken over by the municipalities in which their works are located. But the situation o such a company with reference to this class of righ and obligations is the same irrespective of the question whether its treasurer is or is not to be presumed to have power by virtue of his office to issue promissory notes. Such notes do not bind the franchises or the property of the company any more than debts upon open account. A majority of the court is therefore of opinion that the treasurer of the defendant corporation, by virtue of his office, had authority to sign a note which would bind the corporation.

CARRIERS — SLEEPING CAR COMPANIES—LOSS OF EFFECTS—LIABILITY TO PASSENGER. —The question as to the liability of a sleeping car company for loss of effects by a passenger, came before the Court of Appeals of Colorado in Pullman Palace Car Co. v. Freudenstein, 34 Pac. Rep. 578. It was held that in an action against a sleeping car company for loss by a passenger of his coat while in his berth at night, the presumption of negligence on the part of the defendant arising from such loss is rebutted by the uncontradicted evidence of the car porter that he was on duty, and engaged in watching the car, through the night, till after the loss. Bissell, P. J., says:

The liability of the company, if any, under these facts must of necessity spring from the terms of some express contract between the company and the passenger, or a contract to be implied from the circumstances of the accidental relation of passenger and carrier. This relation must measurably determine the obligations of the Pullman Company, and fix the extent to which the proof must go if they are to respond to losses of this description. It is familiar learning that nothing would excuse the innkeeper or the common carrier when called on for a guest's goods, or what may have been delivered for transportation, except proof that the loss was occasioned by the acts of God or the king's enemies. They were both adjudged to be practically insurers of the property. Storms and armed enemies in open rebellion alone operated to excuse default in performance. The law to this day has practically remained unchanged. With the excep-

tions and reservations contained in modern bills of lading, and admitted by the courts to be binding as contracts under some circumstances, or with the force and effect of notices, agreements, or statutes by which keepers of inns seek to limit what they are pleased to term the "rigors of the common law," we have nothing to do. Without these, such servants of the public are held to a legitimate, advantageous, and entirely proper accountability; an accountability fully warranted by their *status* and their profits. But the groundwork of the liability was found in the facts which gave rise to the relation, and in the correlative advantages of the inn-keeper and the carrier in the collection of their charges. The keeper of the inn was bound to receive the guests, and had a lien on his guest's goods for the price of the entertainment. He furnished him food and lodging, and had the right to exclude from his house all but guests and servants of his own choosing. The carrier had the possession, sole custody, and control of goods delivered to him for carriage, could enforce his lien for freight and retain possession until it was paid, and only his employees could interfere with it during the journey. The courts in a long series of adjudications have held that the Pullman Company cannot be made liable for lost baggage on these grounds. They have held the rules governing innkeepers to be inapplicable, because of the difference in the existing conditions. The law of the carrier has been adjudged to be equally unsuitable, because the possession was not exclusive. The latter difficulty does not seem to me to be entirely insurmountable. The possession of the Pullman Company is practically as exclusive as that either of the innkeeper or the carrier. In either case, the risk of dishonest guests is always an element of danger, which cannot be eliminated. No person has access to the cars except the Pullman servants and the railroad employees. It is no substantial enlargement of the risk to hold the Pullman Company as guarantors for the honesty of these employees. No difficulty could be experienced in reducing this element of risk to an insignificant minimum. Eliminating these features, the company does practically have possession of the traveler's goods. There may not be the formal delivery, but the exclusive possession which ordinarily exempts the railroad company from liability for lost baggage is not retained by the traveler. Of course, it is conceded that if the passenger by coach leaves his coat in the seat, and it be lost, the railroad company cannot be compelled to pay for it. They never had any possession on which a liability could be predicated. No such condition exists in a Pullman car. There the company has possession; a possession not at all similar to that which is called constructive. The passenger buys a place to sleep in, and when he hangs up his coat at the invitation of the Pullman Company he ought both truthfully and legally to be held to give his garment into the possession of the company. If lost, they should be held liable. The only question is whether the loss alone is sufficient to fix the responsibility. The authorities hold otherwise. By an almost unbroken current, which has such volume and impetus that we do not feel vigorous or powerful enough to stem or turn it, courts have held that the basis of the liability is the proven negligence of the company. 3 Wood, Ry. Law, § 368, *et seq.*; Thomp. Carr. 531; Whitney v. Car Co., 143 Mass. 243, 9 N. E. Rep. 619; Hills v. Railway Co., 72 Iowa, 228, 33 N. W. Rep. 643; Scaling v. Car Co., 24 Mo. App. 29; Carpenter v. Railroad Co., 124 N. Y. 53, 26 N. E. Rep. 277; Car Co. v. Pollock, 69 Tex. 120, 5 S. W. Rep. 814; Coach Co. v. Diehl, 84 Ind. 474; Car Co. v. Smith, 73 Ill. 360; Car Co. v. Gardner, 16 Amer. & Eng. R. Cas. 324; Stearn v. Car Co., 8 Ont. 171; The Crystal Palace v. Vanderpool, 16 B. Mon. 302.

While we concede that the law has been thus settled, and that negligence must be shown before the plaintiff can recover, we do not agree with counsel as to what will discharge that duty. It is insisted that there must be positive evidence of a want of care, as by proof of the absence of a proper and sufficient number of servants, a lack of the watch which the cases decide the company must maintain, or some equivalent testimony showing the positive omission of what the law has imposed as a part of the duty which the company owes the traveler to whom it has sold accommodations. This does not coincide with our views of the relative duties of the passenger and the carrier. The Pullman Company has assumed a specific obligation by the sale of a ticket which entitled the traveler to a place to sleep. It was sold with the intention that it might be used for that purpose. When the berth is thus applied to the purposes for which it was sold, the company impliedly agrees that it will use due care to protect the property of the traveler. The passenger is sold a place to sleep in, which the vendor knows is to be used for that purpose. His personal belongings are taken to his apartment with the knowledge and assent of the seller. Thus this property is in the place provided by the company, put there with their consent and approbation, and practically surrendered to to their control and care. When loss is shown it does appear that the company was guilty of negligence sufficiently to entitle the loser to recover. The breach occurs the instant the property is lost. To prove the loss is at least to make *prima facie* proof of the negligence of the company. It is enough to put the company to proof of due care and the maintenance of a proper supervision of the car and its occupants. The burden is then cast on them to prove watch or whatever else may be necessary to establish due care and want of negligence on their part. To shift the burden of this onto the traveler puts him to such a positive disadvantage that nothing short of an imperative necessity would lead us to accept this conclusion.

DELIVERY IN DONATIONES MORTIS CAUSA.

1. Introductory.
2. Distinction between Gifts *Inter Vivos* and *Mortis Causa*.
3. The Delivery.

I.

1. *Introductory.*—In every transfer of personal property, where there is no valuable consideration, the transaction is a gift, and not a sale.[1] But a parol gift of personal chattels does not pass property in them unless there is an actual delivery of them to or for the donee.[2] In the case of Morgan v. Malleson,[3] the court treated a gift, which was

[1] 1 Kerr's Benjamin on Sales, p. 4, § 2.

[2] See Irons v. Smallpiece, 2 B. & A. 551; Shower v. Pilch, 4 Ex. 478; Douglass v. Douglass, 22 L. T., N. S. 127; Power v. Cook, 4 Ir. C. L. 247.

[3] 10 Eq. 475.

imperfect by reason of non-delivery, as an effectual declaration of trust; but this decision, although approved by Malins, V. C., in Bradley v. Bradley,[4] is opposed to the current of the recent English authorities.[5] In the case of a mere gift the tendency of the American authorities is to hold that it is not valid without there has been an actual delivery; and this is true of gifts *mortis causa* as well as *inter vivos*;[6] unless the article is already in the possession of the donee, in which case some of the authorities hold that a delivery is not necessary,[7] but this doctrine is regarded by the writer as very questionable;[8] and some of the English cases hold that where the donor intends to pass the property at once, it is at least a declaration of trust, although there is no actual delivery to the donee,[9] a doctrine which has never obtained a foothold in this country. It is not the purpose of the writer to consider the delivery of gifts generally in this article, for the reason that the subject is too broad for an exhaustive treatment in a single article; he has, therefor restricted the discussion to one branch of gifts only, to-wit: *donatio mortis causa*.

2. *Distinction between Gifts inter vivos and mortis causa.*—The distinction between a gift *inter vivos* and *mortis causa* consists chiefly in the concurrent circumstances requisite for the constitution of each, and the relative effects of the transaction. Where within the provisions of the law, a gift *inter vivos* is effected as soon as the intention to make the gift has been declared and the act completed by acceptance,[10] and as soon as completed, is irrevocable by the donor without the assent of the donee. The question whether the donor is sick, in a perilous position, or live or die, does not enter into the transaction; and his continued existence in no way affects the title to the thing given; whereas such is not the case in a *donatio mortis causa*.[11] In the latter class the gift must be made by the donor,[12] in apprehension

[4] 9 Ch. Div. 113.

[5] See *In re* Breton's Estate, 17 Ch. Div. 416; Heartley v. Nicholson, 19 Eq. 233; Moore v. Moore, 18 Eq. 474; Richards v. Delbridge, 18 Eq. 11; Warriner v. Rogers, 16 Eq. 340.

[6] Conner v. Trawick, 37 Ala. 289; Sims v. Sims, 2 Ala. 117; Wheeler v. Wheeler, 43 Conn. 503; Camp's App., 36 Conn. 88, 92; Hill v. Sheibley, 64 Ga. 529; People v. Johnson, 14 Ill. 342; Hatton v. Jones, 78 Ind. 466; Foglesong v. Wickard, 75 Ind. 258; Slade v. Leonard, 75 Ind. 172; Trowbridge v. Holden, 58 Me. 117; Wing v. Merchant, 57 Me. 383; Hanson v. Millett, 55 Me. 184; Dole v. Lincoln, 31 Me. 422; Allen v. Polerezky, 31 Me. 338; Borneman v. Sidlinger, 15 Me. 429; Taylor v. Henry, 48 Md. 550; Hitch v. Davis, 3 Md. Ch. 266; Davis v. Ney, 125 Mass. 590; Sheedy v. Roach, 124 Mass. 472; Foss v. Lowell Five Cent Sav. Bk., 111 Mass. 285; Kimball v. Leland, 110 Mass. 325; Kingman v. Perkins, 105 Mass. 111; Chase v. Redding, 79 Mass. (13 Gray) 418; Stone v. Hackett, Mass. (12 Gray) 227; Bates v. Kempton, 73 Mass. (7 Gray) 382; Sessions v. Moseley, 58 Mass. (4 Cush.) 87; Grover v. Grover, 41 Mass. (24 Pick.) 261; Lamprey v. Lamprey, 29 Minn. 151, 26 Alb. L. J. 397; Reed v. Spaulding, 42 N. H. 114; Martin v. Funk, 75 N. Y. 134; Curry v. Powers, 70 N. Y. 212; Westerle v. DeWitt, 36 N. Y. 340; Bedell v. Carll, 33 N. Y. 581; Brown v. Brown, 23 Barb. (N. Y.) 565; Hunter v. Hunter, 19 Barb. (N. Y.) 631; Huntington v. Gilmore, 14 Barb. (N. Y.) 243; Vandermark v. Vandermark, 55 How. Pr. (N. Y.) 408; *Re* Ward, 51 How. Pr. (N. Y.) 316; Turner v. Brown, 6 Hun (N. Y.), 331; Johnson v. Spies, 5 Hun (N. Y.), 468; Brink v. Gould, 7 Lans. (N. Y.) 425; Whiting v. Barrett, 7 Lans. (N. Y.) 106; Coutant v. Schoueler, 1 Paig. Ch. (N. Y.) 316; Stevens v. Stevens, 2 Redf. (N. Y.) 265; Adams v. Hayes, 2 *Ired.* (N. C.) L. 366; Simmons v. Cincinnati Sav. Soc., 31 Ohio St. 457; Phipps v. Hope, 16 Ohio St. 586; Withers v. Weaver, 10 Pa. St. 391; *Re* Campbell's Estate, 7 Pa. St. 100; Tillinghast v. Wheaton, 8 R. I. 536; Blanchard v. Shelden, 43 Vt. 583; Dean v. Dean's Estate, 43 Vt. 337; Carpenter v. Dodge, 20 Vt. 595; Baskett v. Hassell, 107 U. S. 302; bk. 27 L. ed. 719; Hahan v. United States, 83 U. S. (16 Wall.)143; bk. 21 L. ed. 307. See for Canadian doctrine, Rupert v. Johnson, 40 Up. Can. Q. B. 11; McCabe v. Robertson, 18 Up. Can. C. P. 471; Queen v. Carter, 13 Up. Can. 611; Scott v. McAlpin, 6 Up. Can. C. P. 302; White v. Atkins, 5 Low. Can. 420; Malone v. Reynolds, 2 Fox & Sm. 59; Young v. Derenzy, 26 Grant Ch. (Ont.) 509; Blain v. Terryberry, 9 Grant Ch. (Ont.) 286.

[7] Tenbrook v. Brown, 17 Ind. 410; Wing v. Merchant, 57 Me. 383; Dole v. Lincoln, 31 Me. 422; Champney v. Blanchard, 39 Me. 116; Huntington v. Gilmore, 14 Barb. (N. Y.) 243; Whiting v. Barrett, 7 Lans. (N. Y.) 106, 109.

[8] See *post* "Previous possession and after-acquired possession."

[9] See Morgan v. Malleson, L. R. 10 Eq. 475; Bromley v. Bunton, L. R. 4 Eq. 562; Penfould v. Mould, L. R. 4 Eq. 562; Richardson v. Richardson, L. R. 3 Eq. 686; Jones v. Lock, L. R. 1 Ch. 25; Donaldson v. Donaldson, Kay, 711; Shower v. Pilck, 4 Ex. 562; *Re* Way's Trustees, 2 De. G. J. & S. 365.

[10] The acceptance of a beneficial gift is presumed by law. Stone v. Hackett, 28 Mass. (12 Gray) 227; Borneman v. Sidlinger, 15 Me. 429; Noble v. Smith, 2 Johns. (N. Y.) 52; Picot v. Sanderson, 1 Dev. (N. C.) L. 309; Viet v. Viet, 34 Up. Can. Q. B. 104; Kerr v. Read, 23 Grant Ch. (Ont.) 525; Tancred v. O'Mullin, 2 Oldright (N. S. Nov. Sc.), 145; Walker v. McBride, 2 Huds. & Br. (Ire.) 215; Hooper v. Goodwin, 1 Swanst. 485. For this reason an acceptance of a gift need not be shown. Thus a gift to an infant or a lunatic who is incapable of acceptance is valid. DeLuvillain v. Evans, 39 Cal. 120; Rinker v. Rinker, 20 Ind. 185.

[11] Sessions v. Morseley, 58 Mass. (4 Cush.) 87; Grover v. Grover, 41 Mass. (24 Pick.) 261, 35 Am. Dec. 319. The difference between a gift *inter vivos* and *causa mortis* is pointed out in Johnson v. Spies, 5 Hun (N. Y.), 468.

[12] Raymond v. Sellick, 10 Conn. 480.

of approaching death,[13] or in peril of death, the gift to take effect absolutely only on the death of the donor;[14] but this last condition need not be expressed by the donor, because the law implies it;[15] and when consummated so far as the donor's acts are concerned, it is liable to be defeated after it has been legally made (*a*), by a recovery from the sickness[16] (*b*), by escape from the peril which threatened the life[17] (*c*), resumption by the donee of the thing given;[18] or (*d*) revocation of the gift,[19] which may be accomplished (*a*) by a

[13] Raymond v. Sellick, 10 Conn. 480; Gratton v. Appleton, 3 Story, 755; Smith v. Kitteridge, 21 Vt. 238; Lee v. Luther, 3 W. & M. 519; Dole v. Lincoln, 31 Me. 422; Knott v. Hogan, 4 Met. (Ky.) 99; Weston v. Height, 5 Shep. (Me.) 287; Smith v. Kittridge, 21 Vt. 238; Candor and Henderson's App., 27 Pa. St. 119; Knott v. Hogan, 4 Met. (Ky.) 99; Dexheimer v. Gautier, 5 Rob. (N. Y.) 216; First National Bk. v. Balcom, 35 Conn. 351; Carr v. Silloway, 111 Mass. 24; Robson v. Jones, 3 Del. Ch. 51; Parcher v. Saco & Biddleford Savings Inst., 78 Me. 470; Dickenschield v. Exchange Bank, 28 W. Va. 340; Ridden v. Thrall, 55 Hun (N. Y.), 185, 27 N. Y. St. Rep. 947; 24 Abb. N. Cas. (N. Y.) 52; 7 N. Y. Supp. 822. To constitute a valid gift *causa mortis* is essential that the donor should make it in contemplation of death, either in his last illness, or while he is in iminent peril, and that his death result from such illness or peril. Dickeschied v. Exchange Bank, 28 W. Va. 340; Parcher v. Saco & Biddford Sav. Inst., 78 Me. 470. Some of the cases hold that the gift must be under apprehension of imminent death, and not of death as possibly the result of the sickness. Robson v. Jones, 3 Del. Ch. 51. But this is not the general doctrine of the cases. It is said in the recent cases of Ridden v. Thrall, 55 Hun (N. Y.) 185, 24 Abb. N. Cas. (N. Y.) 52; 27 N. Y. St. Rep. 947; 7 N. Y. Supp. 822, that if the death of the donor of a gift *causa mortis* ensues from a sudden and unforseen cause before his recovery from his illness or escape from danger, the gift stands complete and the title vests absolutely in the donee, taking effect by relation from the time of the actual delivery of the property or thing. Where a gift was made while the donor was in the expectation of immediate death from consumption, and he afterwards so far recovered as to be able to attend to his ordinary business for eight months, but finally died from the same disease, the court held that such gift could not be supported as a *donatio mortis causa*. West v. Height, 5 Shep. (Me.) 287. In the case of Knott v. Hogan, 4 Metc. (Ky.) 99, at the time a note for money loaned was executed, payable three years after date the interest thereon to be paid annually, the payee executed and delivered to the payor a writing stipulating that if the payee should not collect the note in her lifetime, her representative was directed to surrender it to the maker, "as I intend it as a gift from me to him." The payee retained the note in her possession, and died within a year after executing the writing. The court held that the transaction was not a gift *causa mortis*, because it was not made in immediate contemplation of death. And the Supreme Court of Vermont say in the case of Smith v. Kittridge, 21 Vt. 238, that a delivery of property as a gift, to become absolute upon the decease of the donor, but made while the donor is in health, and without reserving to him the power of revocation, cannot be supported as a *donatio mortis causa*. The court of chancery of Delaware says in the case of Rodson v. Jones, 3 Del. Ch. 51, that a gift by an old man in feeble health cannot be supported as a *donatio causa mortis*, there beidg no "peril of death." The Supreme Court of Pennsylvania, in Candor & Henderson Appeal, 27 Pa. St. 119, where a bond from a father to his child, payable "ten years after date," irrespective of the question whether the father should be alive or dead, was held not to be a *donatio mortis causa*. A gift of money, made by the donor on enlisting in the army, to be retained by the donee in case of the donor's death is held in Dexheimer v. Gautier, 5 Rob. (N. Y.) 216, not to be a good *donatio mortis causa*. To same effect Irish v. Nutting, 47 Barb. (N. Y.) 370; Granley v. Linsenbigler, 51 Pa. St. 345, *contra;* Baker v. Williams, 34 Ind. 547; Gass v. Simpson, 4 Cold. (Tenn.) 288; Percher v. Saco & Biddford Sav. Inst., 78 Me. 470; Dole v. Lincoln, 31 Me. 422; Dickeschied v. Exchange Bk., 28 W. Va. 340.

[14] Emery v. Clough, 63 N. H. 552; Raymond v. Sellick, 10 Conn. 480; Grattan v. Appleton, 3 Story, 755; McCraw v. Edwards, 6 *Ired.* (N. C.) Eq. 202; Dole v. Lincoln, 31 Me. 422; First Nat. Bk. v. Balcom, 35 Conn. 351; Weston v. Height, 5 Shep. (Me.) 287; Smith v. Kittridge, 21 Vt. 238; Daniel v. Smith, 75 Cal. 548, 17 Pac. Rep. 683. It is said in Smith v. Kittridge, 21 Vt. 238, that a delivery of property as a gift, to become absolute on the death of the donor, but made while the donor is in health and without reserving to him any power of revocation, cannot be supported as a *donatio causa mortis;* and in Daniel v. Smith, 75 Cal. 548, 17 Pac. Rep. 683, that to constitute a gift *causa mortis*, the subject of the gift must be delivered either to the donee or some person for his use and benefit, and the donor must part with all dominion over the property, and the title must vest in the donee, subject to the right of the donor at any time to revoke the gift.

[15] Daniel v. Smith, 75 Cal. 548, 17 Pac. Rep. 683.

[16] Weston v. Height, 5 Shep. (Me.) 287; Merchant v. Merchant, 2 Bradf. (N. Y.) 432; Staniland v. Willott, 12 Eng. L. & Eq. 42. But it is said by the Supreme Court of Connecticut in the case of Gilligan v. Lord, 51 Conn. 562, that a gift of an estate and chattels on it made by the donor to his wife when he expected to die soon, is not for that reason revocable on his recovery.

[17] *Id.* It is said in the case of Roberts v. Draper, 18 Ill. App. 167, that if one deposit money to be given to a certain charity if the depositor never returns from an intended journey there is not a *donatio causa mortis* if the depositor does return.

[18] See Hatch v. Atkinson, 56 Me. 324; Wigle v. Wigle, 6 Watts. (Pa.) 522,5 Watts (Pa.) 486; Merchant v. Merchant, 2 Bradf. (N. Y.) 432, 2 Ves. Sr. 433, 7 Taunt. 232. The reason for this is the gift not being made to take effect immediately, but being inchoate, and depending on the event of the donor's death *locus penitentiæ* was reserved to him, of which change of mind the resumption of possession being evidence, determines the donation. Adams v. Nichols, 1 Miles (Pa.), 155. However, if there has been a redelivery by the donor to the donee, and he be in possession at the time of the donor's death, such redelivery will nullify the resumption and make good the original gift; or rather the redelivery will be a new gift of the same kind, and with the same conditions as the original one.

[19] Merchant v. Merchant, 2 Bradf. (N. Y.) 432; Dan

subsequent will (*b*), the subsequent birth of a child,[20] or (*c*), the death of the donee before that of the donor;[21] also (*d*), by the personal representatives in behalf of the creditors,[22] where their rights have been infringed upon, and (*e*) by a violation, on the part of the donee, of the condition on which the donation was received.[23] The Supreme Court of Maine have said, that gifts *inter vivos* and gifts *mortis causa* differ in nothing, except that the latter are made in the expectancy of death, to take effect only on the death of the donor, and may be revoked; otherwise the same principles apply to each.[24] Title to gifts may pass by gift *inter vivos* where there is a delivery of the property with an intention to consummate the gift, but a mere delivery of the property will not in general pass the title; there must be an intention to give, accompanying the act of delivery in order to consummate the gift, and the circumstances attending the delivery of the property must be such as ordinarily accompanies a gift, inducing the donee to believe that the gift was intended, in which case it is said that the gift will be perfect, although it may not have been the secret intention of the donor to make a gift.[25] A gift made during a last sickness, in which the donor did not expect to recover, is a *donatio mortis causa*, and not a gift *inter vivos*;[26] and where a gift of personal property is made to take effect immediately and irrevocably, and is fully executed by complete and unconditional delivery, it is certainly binding upon the donor as a gift *inter vivos*, even if the donor was at the time *in extremis* and died soon after. But where such intent is not manifest, and the gift is otherwise made, under such circumstances it will ordinarily be regarded as a gift *mortis causa;* but even such a gift is not complete without delivery.

3. *The Delivery.*—To make complete and valid a *donatio mortis causa* there must be a transfer of the thing given, and an actual and absolute delivery[28] to the donee,[29] or to

iel v. Smith, 75 Cal. 548, 17 Pac. Rep. 683; Curtis v. Barnes, 38 Hun (N. Y.), 165.

[20] In Bloomer v. Bloomer, 2 Bradf. (N. Y.) 339, it was said that under the law of Connecticut, a *donatio mortis causa* like a will, was revoked by the subsequent birth of a child. This can be done only indirectly, for while it is true that a *donatio mortis causa* is revocable by the donor in his life-time, without the consent of the donee, yet it cannot be revoked by will, because the will does not speak until after the donor's death, and on his death the title in the donee becomes absolute, Merchant v. Merchant, 2 Bradf. (N. Y.) 432; and by relation is complete and absolute from the period of delivery in the life-time of the donor, and for that reason incapable of revocation by any act which was inoperative before and only commenced at the death of the donor. This principle has been established ever since the case of Jones v. Selby, Pre. Ch. 300, 304. Yet, although a gift *mortis causa* cannot be revoked by the will of the donor, it may be satisfied by a legacy given to the donee. Thus it was determined in Jones v. Selby, *supra*, that where there was a donation of a bond for 1,000£ and by a subsequent will, a legacy of equal amount was given generally to the donee, the latter would be a satisfaction of the former; subject, however, to the donee's liability to prove that no satisfaction was intended. It is thought that the same principle which authorizes the application of the doctrine of satisfaction to this species of donation, equally applies to the doctrine of election. Thus if the donation were of a bond and the donor subsequently specifically bequeath it to another, and give by the same will a legacy to the donee, he must elect between the gift and the legacy. See Johnson v. Smith, 1 Ves. Sen. 314.

[21] Merchant v. Merchant, 2 Bradf. (N. Y.) 432.

[22] Gaunt v. Tucker, 18 Ala. 27; Borneman v. Sidlinger, 3 Shep. (Me.) 429; Chase v. Redding, 13 Gray (Mass.) 418; House v. Grant, 4 Lans. (N. Y.) 269; Gano v. Fisk, 43 Ohio St., 462, 54 Am. Rep. 819.

[23] Thus it has been said that where a testator makes a gift *mortis causa* upon the condition that the donee shall receive nothing further from the donor's estate, and she afterwards claims her share therein, she will be required to account for the amount of the donation. Currie v. Steele, 2 Sandf. (N. Y.) 542.

[24] See Dresser v. Dresser, 46 Me. 48, 67.

[25] See Carter v. Perry, 1 Hayw. (N. C.) 2; Hallowell v. Skinner, 4 Ired. (N. C.) 165; Ford v. Aiken, 4 Rich. (S. C.) 133. *Contra* Keeney v. Macy, 4 Bibb. (Ky.) 35; Smith v. Montgomery, 5 Metc. (Ky.) 504; Betts v. Francis, 30 N. J. L. (1 Vr.) 152.

[26] Merchant v. Merchant, 2 Bradf. (N. Y.) 432. Though a bond or note be delivered to a person, and the donor sign an indorsement on it in these words: "For value received I assign all my right to, title and interest in, this bond or note to" the donee, naming him, yet such gift may be shown by the surrounding circumstances to have been a gift *causa mortis*, and not a gift *inter vivos*. See Lewis v. Merritt, 42 Hun (N. Y.), 161; Dickeschied v. Exchange Bank, 28 W. Va. 341. Thus in the case of Delmotte v. Taylor, 1 Redf. (N. Y.) 417, in the New York Surrogate Court, the deceased was in his last illness, suffering from an incurable disease; he has just made his will, and everything tended to show that he was in present apprehension of death; and the court held that, under such circumstances, a gift of his horses, furniture, wearing apparel and watch, was a gift *causa mortis*, and not *inter vivos*.

[27] Dunbar v. Dunbar (Me.), 13 Atl. Rep. 578; Hinschel v. Mauer, 69 Wis. 576, 34 N. W. Rep. 926.

[28] Borneman v. Sidlinger, 3 Shep. (Me.) 429; McDowell v. Murdock, N. & M. 237; Campbell's Estate, 7 Barr (Pa.) 100; Craig v. Craig, 3 Barb. Ch. (N. Y.) 76; Miller v. Jeffrees, 4 Gratt. (Va.) 472; McCraw v. Edwards, 6 Ired. (N. C.) Eq. 202; Chevallier v. Wilson, 1 Tex. 161; Huntington v. Gilmore, 14 Barb. (N. Y.) 243; Hitch v. Davis, 3 Md. Ch. Dec. 266; Michener v. Dale, 23 Pa. St. St. 59; Singleton v. Cotton, 23 Ga. 261; Cutting v. Gilman, 41 N. H. 114; Delmotte v. Taylor, 1 Redf. (N. Y) 417; French v. Raymond, 39 Vt. 632;

a third person in trust for the donee.[30] This transfer and delivery must be made in expectation of death from an existing illness.[31] The delivery necessary to support a gift *causa mortis* must be unequivocal as in case of a gift *inter vivos*,[32] for a delivery which would not execute a gift between the living cannot sustain a gift in view of death.[33] To establish a gift *causa mortis* the law requires clear and unmistakable proof, not only of an intention to give,[34] but of an actual gift[35] perfected by as complete a delivery[36] as the nature of the thing given will admit of.[37] It not only requires the delivery to be actual and complete, such as deprives the donor of all further control and dominion over the thing given, but it requires the donee to take and retain possession until the donor's death.[38]

Westerlo v. De Witt, 36 N. Y. 340; Charleston v. Lovejoy, 54 Me. 445; Egerton's Exrs. v. Egerton, 2 Green (N. J.), 419; Hatch v. Atkinson, 56 Me. 324; Chase v. Dennison, 9 R. I. 88; Gynee v. Hone, 49 N. Y. 17; McGarth v. Reynolds, 116 Mass. 566; Ellis v. Secor, 31 Mich. 185; Killy v. Godwin, 2 Del. Ch. 61; Robson v. Jones, 3 Del. Ch. 51; Emery v. Clough, 63 N. H. 552; Gano v. Fisk, 43 Ohio St. 462, 54 Am. Rep. 819; Madeira's App. (Pa.), 2 Cent. Rep. 312; Lamson v. Monroe (Me.), 2 N. Eng. 453; Denbar v. Dunbar (Me.), 13 Atl. Rep. 578; Henschel v. Maurer, 69 Wis. 576, 34 N. W. Rep. 926.

[29] Jones v. Deyer, 16 Ala. 221; Michener v. Dale, 23 Pa. St. 59; Dole v. Lincoln, 31 Me. 422; Raymond v. Sellick, 10 Conn. 480; McDowell v. Murdock, 1 N. & M. 237; Bowers v. Hurd, 10 Mass. 427; Borneman v. Sidlinger, 3 Shep. (Me.) 429; Grattan v. Appleton, 3 Story, 755; Brinkerhoff v. Lawrence, 2 Sandf. Ch. (N. Y.) 400; Carpenter v. Dodge, 20 Vt. 595.

[30] Wells v. Tucker, 3 Binn. (Pa.) 366; Borneman v. Sidlinger, 3 Shep. (Me.) 429; Dole v. Lincoln, 31 Me. 422; Jones v. Deyer, 16 Ala. 221; Michener v. Dale, 25 Pa. St. 59; Moore v. Darton, 7 Eng. L. & Eq. 134.

[31] Grattan v. Appleton, 3 Story, 755.

[32] Robson v. Jones, 3 Del. Ch. 51.

[33] Kilby v. Godwin, 2 Del. Ch. 61. A few examples will serve to illustrate the proposition. In Coleman v. Parker, 114 Mass. 30, taking the key of a trunk from the place where it was kept, putting goods into the trunk and returning the key to its place, at the request of the owner in his last sickness, he apprehending death, and expressing the desire to make a gift of the trunk and contents *mortis causa*, was held not to be a delivery sufficient for that purpose. It would have been, however, had the owner requested the donee to keep the key. In Fiero v. Fiero, 5 Thomp. & C. (N. Y.) 151, 2 Hun (N. Y.), 600, a woman who had money on deposit in a savings bank, during her last illness, told a girl who lived with her, and had the custody of her bank book, to get the book, which, being done, said, "take and keep it, and lock it up." The girl retained the book. But this was held not sufficient to establish a gift *causa mortis*, as the evidence was not enough to show such intention, and the transaction did not constitute a delivery. The Supreme Court of Rhode Island considered a similar case in Case v. Dennison, 9 R. I. 88, where a woman, about to die, requested her son to get her bank book, then in the possession of her son-in-law, settle bills and divide the residue of the deposit among her three children; and the court held that this was not a gift *causa mortis* for want of delivery. But where a father, having lent his son a sum of money, took a deposit of the title deeds of an estate, together with a bond, and the son afterwards borrowed the deeds from his father, and mortgaged the property to another person unknown to the father, who during an illness, from which he never recovered, gave his son the bond, at the same time saying to him, "take this, but do not wrong your children, and do not mortgage your property" the English court held that this constituted a valid *donatio mortis causa* for the benefit of the son alone. Meridith v. Watson, 23 Eng. L. & Eq. 250. Where a volunteer soldier, in daily expectation of being ordered to the seat of war, while on a furlough at the house of a friend gave into the possession of that friend certain personal property, telling him in the presence of witnesses to keep such property till his return, and adding "if I never return it is yours," and soon afterward went to the front, and at the end of about ten months died in the service, of a disease contracted while in such service: The Supreme Court of New York held that the transaction did not constitute a valid *donatio mortis causa*. Irish v. Nutting, 47 Barb. (N. Y.), 370. In the similar case of Gourley v. Linsenbigler, 51 Pa. St. 345, G enlisted in the United States service, and on the same day gave P two notes enclosed in an envelope directed to L, G telling P to "give them to L," and saying that "if he never came back he wanted her to have the notes, as he would rather she would have them than any other person." P afterwards delivered the envelope with the notes to L. G was in good health at the time of the delivery, but four months afterwards died of disease in the service. The court held that this transaction was not a *donatio mortis causa*.

[34] Hatch v. Atkinson, 56 Me. 324; Egerton's Exrs. v. Egerton, 2 Green (N. J.) 419; Gano v. Fisk, 43 Ohio St. 462; 54 Am. Rep. 819. In the last case it is said that gifts *causa mortis* are exceptions to the law governing testamentary dispositions, not to be extended by way of analogy, and that intention and actual delivery must be clearly proven.

[35] *Id.*

[36] Phillips v. McGrew, 13 Ala. 255; Huntington v. Gilmore, 14 Barb. (N. Y.) 243; Carpenter v. Dodge, 20 Vt. 595; Hatch v. Atchison, 56 Me. 324. Mere words will not change the possession. Huntington v. Gilmore, 14 Barb. (N. Y.) 243. A gift is ineffectual, both in chancery, and at law, without actual delivery, of the property; and the principle is the same whether the gift be *inter vivos* or *mortis causa*. Carpenter v. Dodge, 20 Vt. 595. See Phillips v. McGraw, 13 Ala. 255.

[37] Hatch v. Atkinson, 56 Me. 324; Madeira's App. (Pa.) 2 Cent. Rep. 312; Lamson v. Monroe (Me.), 2 N. Eng. 453; Hitch v. Davis, 3 Md. Ch. Dec. 266. The court in the last case say that it is necessary to the validity of a *donatio mortis causa*, that a delivery should be made according to the manner in which the subject of the gift is susceptible of being delivered; but that an actual delivery may be inferred from facts and circumstances, and need not be proved by the witness who saw it made.

[38] Hatch v. Atkinson, 56 Me. 324; Dickerschied v. Exchange Bank, 28 W. Va. 340; Craig v. Craig, 3 Barb. Ch. (N. Y.) 76. In the case of Dickerschied v. Exchange Bank, cited above, it is said that the dono

Although the delivery may have been at the time complete, yet this will not be sufficient,[39] unless the possession be constantly maintained under the donee. If the donor again has possession of the thing given, the gift becomes nugatory. And public policy requires these rules to be enforced with great stringency. It is far better that occasionally a gift of this kind fail, than that the rules of the law be so relaxed as to encourage fraud and perjury.[40] The requirement of delivery is no more essential to gifts *mortis causa*, than to all gifts; and though tradition, or some equivalent, seems to have been necessary at common law to pass chattels by gift, yet it was always competent to transfer them by writing.[41] It is said in the case of Brinckerhoff v. Lawrence,[42] that the strong expressions in the books of common law, against maintaining donations either *causa mortis* or *inter vivos*, without delivery, are owing to such gifts being usually claimed on parol evidence; but where the intent of the donor is proved by writing under his hand, a delivery will be presumed from slight circumstances. It is said in Malone's Estate,[43] however, that any act on the part of the owner of a chose in action, showing not only a present intention to transfer, but that he regarded himself as having carried his intention into effect, is sufficient, without written evidence of the transaction, and that in this respect there is no difference between gifts *causa mortis* and *inter vivos*.

must part with all dominion over the object of things given, so that no further act of his or of his personal representative is necessary to vest the title perfectly in the donee, to belong to him presently as his own property, in case the donor shall die of his present illness, or from the impending peril, without making any change in the relation of the gift, leaving the donee surviving him.

[39] Delmotte v. Taylor, 1 Redf. (N. Y.) 417; Hatch v. Atkinson, 56 Me. 324. In the former case the court say the mere fact that the thing has passed into the possession of the donee, even by the act of the donor, is not sufficient.

[40] See Hatch v. Atkinson, 56 Me. 324.

[41] Ellis v. Secor, 31 Mich. 195.

[42] 2 Sandf. Ch. (N. Y.) 400.

[43] 13 Pa. St. 313.

ADVERSE POSSESSION—TITLE TO PEWS—DESTRUCTION OF PEWS—RIGHTS OF OWNER.

AYLWARD V. O'BRIEN.

Supreme Judicial Court of Massachusetts, Nov. 28, 1893.

1. Where the conveyances under which plaintiff claimed title to a pew were executed by the archbishop, who held title to the soil on which the church stood, were good as conveyances of real estate, except for the lack of seals, plaintiff might acquire a good title by adverse possession, if he occupied under the deeds believing them to be valid.

2. Where pews are removed from a church merely as a matter of expediency, the owners are entitled to payment.

ALLEN, J.: The plaintiff's right must be determined independently of the statutes relating to the power of parishes or proprietors of meeting-houses to take down meeting-houses and destroy pews. Those statutes apply to proprietors of meeting-houses who have organized as corporations, and the powers given therein are to be exercised by the corporations. Pub. St. ch. 38, § 27 *et seq.* There are also statutes providing specially how Roman Catholic churches may become incorporated, (Pub. St. ch. 38 §§ 48, 50; St. 1879, ch. 108); but it does not appear that the church or society in question ever became incorporated under these statutes. Under the eleventh amendment of the constitution, adopted in 1833, the Roman Catholic denomination stands on the same footing before the law as other religious sects and denominations; and in the present case, there being no statutes having a special application, the rights of the parties depend on general principles of law as applied in Massachusetts, and on the usages which have prevailed here. Not much light is to be got from decisions as to the rights of pew holders in England or elsewhere, where different laws, usages, and systems of religious administration have been established. Attorney General v. Federal St. Meeting-house, 3 Gray, 1, 64.

The first question is, what was the plaintiff's title? There was evidence as to this, and the report states that at the trial no question was made as to the plaintiff's title to the pews; but the defendant contended that they were owned only as pews are owned in the Roman Catholic Church according to the laws and usages of that denomination. We have therefore to look into the report to see what sort of a title the plaintiff had. The title in the soil stood in the archbishop. Prior to St. 1855, ch. 122, pews except in Boston were real estate. Trespass would lie for interference with the pew owner's right to his pew. Jackson v. Rounselville, 5 Metc. (Mass.) 127. A conveyance of the pew, therefore, should be by deed. The conveyances under which the plaintiff claims title were executed in 1843 and 1852 by the archbishop, who owned the soil. These two conveyances were in the form of deeds, except that neither of them was under seal, nor called for a seal. This omission would render the conveyances ineffectual as deeds of real estate. But the plaintiff claims title by adverse possession. The conveyances ran to the grantees and their heirs forever; subject, however, to a condition. They also described the terms on which the grantees might lose their rights as owners. The conveyances were in form adapted to convey a good title to real es-

tate in all respects, except in the want of seals or words calling for seals; and the grantees occupying under them, if they understood their title to be good, as they may have done, had a basis upon which to begin an adverse possession. Whether the plaintiff had gained a title by adverse possession was a question of fact. The court could not rule against him as matter of law as to his title, and we think did not intend to do so. Certainly, the plaintiff had a sufficient case for the jury as to his title, unless the title to pews in a Catholic Church is different from the title to pews in other churches. There is nothing in the facts of the case to show that in 1843 or 1852 the title to pews in Catholic Churches, when conveyed to individuals, was held by them in any different way, or that it conferred any different right upon the pew owners, than in the churches of other religious denominations. The various pieces of testimony introduced to show the methods and usages of that denomination do not seem to touch the question of the right of a pew holder who has a title to his pew.

The decrees of the council held in 1868 go to show that many of the ordinary corporate powers of proprietors of meeting-houses, are vested in certain ecclesiastical officers; but they do not reach the question what rights a pew holder acquires by virtue of his ownership of a pew. In respect to these rights, the plaintiff as pew holder, stood in the same position as a pew holder in a church of any other denomination, under the general rules or principles of law. The general right of a pew holder, as between himself and the parish or the proprietors of the meeting-house, is settled by a course of decisions. The parish or the proprietors may abandon the meeting-house as a place of public worship without any liability to pew holders, although the pews may thereby be rendered nearly or quite useless; and the fact that the meeting-house is still fit to be used does not render the parish or the proprietors liable. Fassetts v. Parish, 19 Pick. 361. It is within the power of the parish or the proprietors to determine whether to take down a church or to make alterations and repairs. The pew holder cannot prevent them from doing this. The parish or the proprietors or the owners of the soil, and they may determine all matters relative to the structure to be maintained thereon. Daniel v. Wood, 1 Pick. 102; Gay v. Baker, 17 Mass. 435; *In re* New South Meeting-house, 13 Allen, 497, 507. Nevertheless, the right of the pew holder is held to be of such a nature that he is entitled to an indemnity if the parish or the proprietors exercise their right to take down the church when it is in such a condition that its demolition is not actually necessary. If it has become necessary to take down a meeting-house,—that is to say, if a meeting-house has become so old and ruinous that its further use is not practicable,—the parish or proprietors need not make payment to a pew holder for the removal of his pew. But if a meeting-house is taken down, or the pews are removed, merely as a matter of expediency, the pew holders are entitled to payment. This rule has been so often stated and maintained that it must be taken to be settled law of this commonwealth, however the law may be elsewhere. Howard v. North Bridgewater, 7 Pick. 138; Kimball v. Parish, 24 Pick. 347, 349; Gorton v. Hadsell, 9 Cush. 508; Wentworth v. Parish, 3 Pick. 344. It is obvious that if, for any reason, the place of public worship has been changed so that religious services are no longer held in the church which was formerly used for that purpose, the value of a pew is much diminished; but, when such change has been made merely from reasons of expediency, the parish or proprietors cannot go on and demolish the pew without making compensation to the owner of it. He still has an existing right, which may not be very valuable, but which, nevertheless, is entitled to recognition under the laws. Religious services may be re-established there, or other uses of this pew may be open to the pew holder. The archbishop had no greater rights in respect to the demolition of the plaintiff's pews than an organized religious corporation of any other denomination would have had by reason of its ownership of the church. The right of the pew owner is not subject to the absolute power of such a corporation to destroy the pew; and it could not properly be ruled, as matter of law, that the plaintiff's rights were wholly gone. Under the terms of the report in the opinion of a majority of the court, the verdict must be set aside, and the case stand for trial. Case to stand for trial.

NOTE.—*Rights of Pew Holders.*—A pew holder has a right to the exclusive occupation and use of his pew upon those occasions for which pews are designed to be used. Gay v. Baker, 17 Mass. 435; Kimball v. Second Parish, 24 Pick. 349; First Baptist Society v. Grant, 59 Me. 245; Kellogg v. Dickinson, 18 Vt. 266; O'Hear v. Goesbriand, 33 Vt. 892. A pew holder's right is only a right to occupy his pew during public worship and when the meeting house is in such ruinous condition that it cannot be and is not occupied for public worship he can recover only nominal damages, for injury to his pew. Howe v. Stevens, 47 Vt. 262. And see Jackson v. Rounseville, 5 Met. 132. Their right to use and occupation is by some writers termed an easement. Washburn on Easements, 515; Union House v. Rowell, 66 Me. 402; First Baptist Society v. Grant, 59 Me. 251. But it may be doubted whether the right of a pew holder to his pew is an easement unless it is appurtenant to some tenement. See article by J. A. Sedden on Rights of Pew Holders, 15 Cent. L. J. 101. Also O'Hear v. Goesbriand, *supra*. It is a qualified interest subject to the rights of the religious society owning the land and building. First Baptist Society v. Grant, *supra;* Freligh v. Platt, 5 Cowan (N. Y.), 494; Erwin v. Hurd, 13 Abb. N. C. (N. Y.) 96; Kimball v. Second Parish, *supra;* Church v. Wells, 24 Pa. St. 249; Sohier v. Trinity Church, 109 Mass. 21. "Pews are held by very peculiar titles," says the Supreme Court of Massachusetts, in Sohier v. Trinity Church, *supra*. "They constitute an unqualified and usufructuary right being a right to occupy under certain restrictions." To the same effect see the language of Shaw, C. J., in Attorney-General v. Federal Street

Meeting House, 3 Gray (Mass.), 445. The interest of a pew holder is necessarily limited in point of time, for if the house be burned or destroyed by time the right is gone. Abernethy v. Society, 3 Daly (N. Y.), 1; Freligh v. Platt, 5 Cowan (N. Y.), 494; Voorhees v. Presbyterian Church, 17 Barb. (N. Y.) 108. It is now settled that in the absence of statutory provisions the pew holder's interest is to be considered as realty (O'Hear v. Goesbriand, *supra;* Barnard v. Whipple, 29 Vt. 401; Kellogg v. Dickinson, *supra;* Howe v. Stevens, *supra;* Church v. Bigelow, 16 Wend. (N. Y.) 28; Third Presbyterian Church v. Andruss, 21 N. J. L. 325; Price v. Lyon, 14 Conn. 279; Succession of Gamble, 23 La. Ann. 9; Bates v. Sparrell, 10 Mass. 324), and subject to the incidents of other real estate. For instance a contract for the sale of a pew is held within the statute of frauds. Hodges v. Green, 28 Vt. 358; Barnard v. Whipple, *supra;* Livingston v. Trinity Church, 45 N. J. L. 237; Price v. Lyon, 14 Conn. 279. Compare, Stoddert v. Port Tobacco Parish, 2 Gil. & J. (Md.) 227. But it must be borne in mind that his right is incorporeal giving him no legal interest in the church edifice, the materials of which it is composed, or the land upon which it stands. Abernethy v. Society, *supra; In re* Reformed Dutch Church, 16 Barb. (N. Y.) 237; Gay v. Baker, 17 Mass. 425; Cooper v. First Presbyterian Church, 32 Barb. (N. Y.) 234. But see Revere v. Gannett, 1 Pick. (Mass.) 169. It is said that an individual right to the occupation of a particular pew cannot arise from an occupation alone that the right can only be acquired by a faculty which is personal to the grantee or by prescription which will not arise from a possession unless it be annexed to a tenement, or by grant which must be by deed or writing. This last mode is practically the only method by which a pew right is acquired in the United States. New Jersey v. Trinity Church, 45 N. J. L. 230. In cases involving rights in church pews the courts naturally incline toward proceeding on broad equitable grounds and laying stress on technical principles in law only when they afford expedients for doing substantial justice. Thus it was in the principal case.

This subject has quite recently been examined with great care by Chief Judge Daly in Mayor v. Temple Bethel, New York Common Pleas, February 4th, 1893. He cites many of the Massachusetts cases referred to in the principal case, apparently with approval. The exact point decided by Judge Daly was that upon the sale of a house or place of worship and the removal of a religious society therefrom it is the duty of the trustee to tender to a pew holder a pew in the new edifice corresponding in location to that which he owned in the former building, upon the payment of such sum as in equity he ought to pay if the cost of the new structure exceeds the proceeds of the sale of the old property together with the sums in the treasury of the society, and if they fail to alot him such pew he has a cause of action to be indemnified in damages for his loss. A special agreement was alleged between the corporate officers and the pew holders calling for the allotment of pews in the new edifice in substantial conformity with the claim made by plaintiff and the actual decision of the court. But it was held that such agreement embodied only an abstract equitable principle which the court itself would have applied if no such contract had been made. The conclusion reached in this case whether regarded as merely enforcing the express contract or as involving an exercise of judicial discretion is consistent with the spirit of the Massachusetts cases and previous adjudications in New York.

CORRESPONDENCE.

REDEMPTION OF LEASEHOLD—INTEREST IN HOMESTEAD.

To the Editor of The Central Law Journal:

A wife executed a trust deed in the nature of a mortgage, conveying a leasehold interest in real estate in Illinois, on which their homestead is erected, the trust deed "waiving and releasing all rights under and by virtue of the homestead exemption laws of this State." Afterwards A executed a voluntary assignment for the benefit of his creditors, under the statute, in which his statutory exemptions (including, of course, homestead) were expressly reserved. During the pendency of the assignment proceedings in the county court, the trust deed was foreclosed by bill in chancery. The assignee, after the foreclosure sale, and before the expiration of the time allowed for redemption, under order of the county court, sold A's equity of redemption in the premises to B. It seems to be settled that a leasehold interest will support a homestead right. Thompson on Homesteads and Exemptions, § 176, *et seq.* Under Adams v. Beale, 19 Iowa, 67, and other cases, it would seem that the owner of a homestead might redeem from the sale. *Quære:* Has the husband any right to redeem the leasehold estate from the foreclosure sale, not having waived his homestead right in the assignment? Did his equity of redemption pass by the assignee's sale to B? He certainly has the right to occupy the homestead pending the time for redemption; is this right separable from his right to redeem? Z.

BOOK REVIEWS.

CHURCH ON HABEAS CORPUS.

This is the second edition of a work whose first appearance in 1884 supplied the profession with a distinctive treatise on a most interesting and valuable branch of the law, and which had theretofore been somewhat neglected by text writers. The first edition was a well prepared treatise and has been cited in courts as a controlling authority on the subject of *Habeas Corpus.* The present edition is a substantial improvement upon the first. Considerable new matter, many new chapters and over twelve hundred additional cases have been added. The subject of *habeas corpus* has been rapidly growing and is developing to such an extent as to justify a new edition. The work treats not only of *habeas corpus* but also at considerable length of jurisdiction of courts, false imprisonment, writ of error, extradition, *mandamus, certiorari,* judgments, etc. It is a book of one thousand pages well indexed, printed and bound. Published by Bancroft-Whitney Co., San Francisco.

SPELLING ON EXTRAORDINARY RELIEF.

The author of a very satisfactory work on "the law of private corporations" here gives us his view of what is known as extraordinary relief in equity and at law, covering the subjects of Injunction, Habeas Corpus, Mandamus, Prohibition, Quo Warranto, and Review on Certiorari. These subjects are exhaustively considered and in a style admirable for its clearness, and with so liberal citation of authorities as to impress one with the diligence of the author. Without going into the details of its plan we will content ourselves with the statement that there seems to be lacking from its pages nothing that should probably belong there. We have no hesitation in recommending the treatise to the profession as being exhaustive and accurate. It is in the shape of two large volumes beautifully printed and bound. Published by Little, Brown & Co., Boston.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

---

1. ADMINISTRATION.—Rev. St. 1881, § 2228, subd. 1, providing that letters of administration may be granted in the county of which intestate was, at his death, an inhabitant, is not connected with or dependent on the following subdivisions, requiring the possession of assets by the intestate; and an administrator may be appointed in the county of the intestate's residence, though there are no tangible assets to administer.—TOLEDO, ST. L. & K. C. R. CO. v. REEVES, Ind., 35 N. E. Rep. 199.

2. ADMINISTRATION — Sale of Realty — Widow.—The one-third of the real estate which goes to the widow on the death of her husband is, for the purpose of paying his debts, a part of his estate to be administered, so that a license to sell for that purpose "the interest of said estate" in describing land, will cover the widow's third.—SCOTT v. WELLS, Minn., 56 N. W. Rep. 828.

3. ADMINISTRATORS—Change of Venue.—Under Rev. St. 1881, § 412, providing for the change of venue of a civil action for bias prejudice of the judge, a party to an administration cannot have a change of venue or judge in a proceeding merely to remove the administrator. To give his motion any wider basis, he must have excepted to the administrator's report.—MCCLELLAND v. BRISTOW, Ind., 35 N. E. Rep. 197.

4. ADMIRALTY — Jurisdiction—Constitutional Law.—Hill's Code, § 3698, so far as it authorizes a proceeding *in rem* in the State Courts to enforce a lien for necessary supplies furnished a vessel in her home port, is invalid, as it contravenes Const. U. S. art. 3, § 2, and Rev. St. U. S. §§ 563, 711, which give exclusive jurisdiction of such proceedings to the District Courts of the United States.—PORTLAND BUTCHERING CO. v. THE WILLAPA, Oreg., 34 Pac. Rep. 689.

5. APPEAL.—On appeal by land-owners from an order of the court on their exceptions to the report of the commissioners in drainage proceedings, the Supreme Court will not review the subsequent independent action of the court in establishing a branch ditch, though that may have been suggested by the exceptions to the report.—BOWMAN v. ELY, Ind., 35 N. E. Rep. 123.

6. APPEAL—Decision—Appellate Court.—Rev. St. 1891, ch. 110, § 88, declares that when the Illinois Appellate Court makes a decision as the result of a finding of facts different from that of the trial court it shall recite in its final order the facts so found, and that "the judgment of the Appellate Court shall be conclusive as' to all matters of fact in controversy in such cause.' Held, that where, in an action for injuries alleged to be caused by the defendant's negligence, the Appellate Court reverses a judgment for the plaintiff, and finds that the defendant was not guilty of negligence, it is not necessary to remand the cause for a new trial, since the finding is conclusive against the defendant's liability.—SENGER v. PRESIDENT, ETC., OF TOWN OF HARVARD, Ill., 35 N. E. Rep. 137.

7. APPEAL—Judgment.—Where, in an equitable proceeding, the unsuccessful party secures a re-examination by the District Court of the questions at issue upon an application in the nature of a bill of review, although by motion instead of petition, he will be held to have waived his right to appeal from such decree.—WILSON v. ROBERTS, Neb., 56 N. W. Rep. 787.

8. APPEAL—Jurisdictional Amount.—The defendant was sued for $150, rent for a certain water privilege for which it had agreed to pay $50 per annum, and pleaded the general issue and a set-off of $850, for rents paid in previous years, through mistake, as it alleged: Held that, as the set-off was a mere specious pretense, the appellate court had no jurisdiction of the matter, the amount involved being only the $150, and the minimum amount for which an appeal can be taken being $500.—MANCHESTER PAPER-MILLS CO. v. HETH, Va., 18 S. E. Rep. 189.

9. APPEAL—Pleadings.—Where there has been a finding by the jury that a certain paragraph of the answer is not true, the appellate court will search the record, including the evidence, to ascertain whether an error in overruling plaintiff's demurrer to such paragraph was harmless; and the judgment will not be reversed if it affirmatively appear that no evidence prejudicial to plaintiff was admitted under such paragraph.—MCFADDEN v. SCHROEDER, Ind., 35 N. E. Rep. 131.

10. ASSUMPSIT—Void Garnishment.—In an action by the assignee of a debt against the debtor it is no defense that defendant paid over the sum due as garnishee in proceedings against the assignor, the original creditor, where such garnishment proceedings were void for want of summons to show cause.—UNION BANK v. HANISH, Mich., 56 N. W. Rep. 768.

11. ATTACHMENT—Debt not Due.—As Code 1887, ch. 6, authorizing an action aided by attachment on a debt not due in certain cases, permits defendant to traverse the affidavit and provides that, if plaintiff fails to substantiate the cause alleged, the attachment shall be dissolved, and the action dismissed, a judgment for plaintiff on a trial by the court, where the affidavit has been traversed, cannot be sustained unless there is a finding on the facts alleged as ground for the attachment.—WOODS v. TANQUARY, Colo., 34 Pac. Rep. 737.

12. ATTACHMENT—Exemption—Wages.—Under Pub. St. ch. 183, § 30, which exempts from attachment by trustee process $20 due for wages for personal labor and services, except when the demand is for necessaries furnished to defendant or his family, when only $10 is exempt, the fact that the employee's wages have been attached is no defense to an action by him against the employer to recover $10 thereof, since in no event can

this sum be subjected to the attachment.—SULLIVAN V. HADLEY CO., Mass., 35 N. E. Rep. 103.

13. ATTACHMENT—Levy—Notice.—Code Civil Proc. § 181, which provides for the attachment of the property of defendant "as security for the satisfaction of any judgment that may be recovered in the action, unless defendant give good and sufficient security to secure the payment of said judgment," does not require the writ of attachment to be served on defendant, and an opportunity to be given him to give a bond or make a deposit of money, prior to the levy on his property.—HOFFMAN V. IMES, Mont., 34 Pac. Rep. 728.

14. ATTACHMENT—Public Lands.—Under Rev. St. U. S. § 2263, relating to pre-emption of public lands, and providing that "all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void," the interest of a pre-emptioner, before final entry, is not subject to attachment, though Gen. St. 1883, § 2676, provides that the owner of every claim or improvement on land has a transferable interest therein, which may be sold on execution or otherwise.—MCMILLEN V. LEONARD, Colo., 34 Pac. Rep. 681.

15. BILL OF EXCEPTIONS.—While a trial judge has the right to indorse on a bill of exceptions the reasons explanatory of his ruling, he has no right to contradict the bill; and if it is incorrect, and the attorney does not agree to the proposed correction, the judge should prepare his own bill, as required by Rev. St. art. 1366. —JONES V. STATE, Tex., 23 S. W. Rep. 793.

16. BOUNDARIES — Establishment — Acquiescence. — Where there is a dispute as to the exact boundary between the owners of adjoining lands, and a county surveyor establishes a line upon an actual survey of the lands, and both claimants participated in making and paying the expenses of the survey, which survey was acquiesced in for a considerable time afterwards, it will not be disturbed because a new survey, made some years afterwards, tends to show a mistake in the establishment of such line.—BENSON V. DALY, Neb., 56 N. W. Rep. 788.

17. CARRIERS—Ejection of Passengers.—Plaintiff purchased from defendant railroad company a ticket consisting of several coupons. After traveling the distance represented by the first coupon, he changed cars. On presenting the ticket to the second conductor, it was discovered that the second coupon was missing, and plaintiff informed him that it had been taken up by the first conductor. Plaintiff would not pay his fare, and was ejected from the train. He afterwards bought a ticket, and completed his journey: Held, that plaintiff could recover only the amount of the fare paid after he was ejected.—VAN DUSAN V. GRAND TRUNK RY. CO. OF CANADA, Mich., 56 N. W. Rep. 848.

18. CARRIERS — Injuries to Passenger. — Where the trainmen, on leaving a station, announce the next station, there is no negligence in failing to state that the train will stop at a railroad crossing before it reaches the next station; and therefore the company is not liable to a passenger who, without the knowledge of the trainmen, attempted to leave the train when it stopped at the crossing, thinking it was the station announced, and was injured thereby.—MINOCK V. DETROIT, G. H. & M. RY. CO., Mich., 56 N. W. Rep. 780.

19. CARRIERS — Interstate Commerce Law—Discrimination.—Under sections 2 and 3 of the interstate commerce law (24 Stat. 379, 380), the mere fact of the existence of ocean competition (assuming that such competition may in some cases and in some degree warrant a difference in rates) will not justify a railroad company's rates for carrying merchandise from New Orleans to San Francisco which comes to New Orleans from domestic points, which rates are treble, and in some cases four times, the rates charged for carriage of like kinds of merchandise from New Orleans to San Francisco which reach New Orleans from foreign ports, although such lower rates constitute the only condition on which the carrier can obtain any part in such foreign traffic. — INTERSTATE COMMERCE COMMISSION V. TEXAS & PAC. RY. CO., U. S. C. C. of App., 57 Fed. Rep. 948.

20. CARRIERS—Live Stock—Connecting Lines.—Where a horse transported by successive carriers has been injured in transit, in the absence of evidence to the contrary, the injury is presumed to have been caused through the fault of the last carrier.—TEXAS & P. RY. CO. V. BARNHART, Tex., 23 S. W. Rep. 801.

21. CARRIERS — Passengers — Negligence. — Where plaintiff's intestate was killed in a railway accident caused by a rock becoming detached from a hillside, and falling on the train, the burden of proof to show negligence is on plaintiff, the accident being disconnected with the appliances and operation of the road.—FLEMING V. PITTSBURGH, C. C & ST. L. RY. CO., Penn., 27 Atl. Rep. 858.

22. CARRIERS—Passenger — Presumption as to Negligence.—Under the provisions of section 3, art. 1, ch. 72, Comp. St., it is only necessary to a right of recovery against a railroad company to show that the person injured was at the time being transported as a passenger over the defendant's line of railroad, and that the injury resulted from the management or operation of said railroad. A presumption thereupon arises that such management or operation was negligent, and it can be met only by showing that the injury arose from the criminal negligence of the party injured, or that the injury complained of was the result of the violation of some express rule or regulation of said railroad company, actually brought to the notice of the party injured.—UNION PAC. RY. CO. V. PORTER, Neb., 56 N. W. Rep. 808.

23. CARRIERS OF PASSENGERS—Contract of Carriage.—A "special excursion ticket" was expressly subject to the condition "that for the return journey this ticket will not be valid unless presented by the original purchaser to the agent of the Pennsylvania line at Chicago, Ill., to be stamped on the back," as a "notice to purchaser," printed in large letters on the face of the ticket, stated: Held, that the condition was reasonable, and that it was the purchaser's duty to read and comply with its terms. — BOWERS V. PENNSYLVANIA CO., Penn., 27 Atl. Rep. 893.

24. CARRIERS OF PASSENGERS — Street Railway. — When a street car stops for passengers to alight, if there is a rush of passengers to get off, crowding and jostling each other, it may be the duty of the conductor to use reasonable efforts to check it, to the end that passengers may not be injured or unnecessarily interfered with in their getting off, but it is not his duty to assist specially any one of the well, able-bodied passengers, unless he sees that one to be in special danger, or in some measure unable to take care of himself.—JARMY V. DULUTH ST. RY. CO., Minn., 56 N. W. Rep. 813.

25. CHATTEL MORTGAGES — Discharge.—A first mortgagee of chattels, for the purpose of securing payment of the mortgage debt and an unsecured debt, purchased the chattels, agreeing that his mortgage should be considered as paid, that he should pay other chattel mortgages, and that any balance after payment of the unsecured debt should be paid the mortgagor. By direction of the purchaser the bill of sale was made to a third person: Held, that the first mortgage was thereby discharged, so that the second mortgagees could proceed against the property.—ROWLEY V. BATES, Mich., 56 N. W. Rep. 769.

26. COLLATERAL ATTACK—Administrator's Sale.—In a collateral attack on an administrator's deed, a recital in the order of sale by the Probate Court that an application to sell has been made is sufficient proof of such application, though it does not appear in the records of the Probate Court. — PERRY V. BLAKEY, Tex., 23 S. W. Rep. 804.

27. CONDITIONS OF POLICY.—A policy of fire insurance contained a clause that it was based upon a written

application, the statements in which should be treated as warranties. In the application the insured was asked whether he would keep his books of account in an iron safe or secure in another building, to which the answer was, "Yes:" Held, that this statement was a warranty, and, unless the books were kept as stated, there could be no recovery under the policy. — VIRGINIA, FIRE & MARINE INS. CO. v. MORGAN, Va., 18 S. E. Rep. 191.

28. CONSTITUTIONAL LAW—Statutes — Amendment .— Const. art. 4, § 22, which provides that "no act shall ever be revised or section amended by mere reference to its title, but the act revised or section amended, shall be set forth and published at full length," does not inhibit the enactment of a general law which is complete and perfect in itself, and not amendatory or revisory in its character, though such law by implication amends other statutes on the same subject.—WARREN v. CROSBY, Oreg., 34 Pac. Rep. 661.

29. CONSTITUTIONAL LAW — Staying Death Sentence Pending Appeal.—The power of staying the execution of a death sentence pending an appeal, conferred on the Supreme Court by Rev. St. 1881, § 1888, is not the granting of a reprieve, within the meaning of Const. art. 5, § 17, giving the governor that power, since such a construction would annihilate article 3, § 1, which creates the three departments of government, and renders the judicial independent of the executive.—PARKER v. STATE, Ind., 35 N. E. Rep. 179.

30. CONTRACT—Construction.—A contract to repair an old building and build an addition, the old part to be turned round, stipulated a certain sum for the whole work, to be paid as follows: "Old part placed in position $200; foundation in and frame up, $300; inclosed, and roof on, chimneys up, and the building completed according to agreement and specifications, $300:" Held that, the work on the new part not being in condition to entitle the contractor to the third installment, when the building was destroyed by fire, no recovery on such installment could be had for work on the old part, though that was substantially completed, the contract being an entirety.—CLARK v. COLLIER, Cal., 34 Pac. hep. 677.

31. CONTRACT—Indemnity—Several Contract.—A contract whereby the signers agree each with all the others, and each with those who are or may become liable as indorsers on the paper of the H Co, to protect such indorsers in proportion to each stockholder's holding, being a several contract, it is no defense, for one who signed it unconditionally, that others did so on condition that all the persons named in it should sign.—TAYLOR v. MATTESON, Wis., 56 N. W. Rep. 829.

32. CONTRACT—Joint and Several Liability.—A joint and several liability of two contractors for materials furnished was shown by evidence that one of the contractors ordered the materials for both, and that the other contractor said that the account, when presented, was correct, and that he would pay half if the orderer would pay the other half.—GUINN v. O'DANIEL, Tex., 23 S. W. Rep. 850.

33. CONTRACT—Part Performance—Measure of Damages.—When, under a valid contract to perform a specified work for a specified price, the plaintiff has done part, and has been prevented from performing completely through the fault of the defendant, the legal measure of the plaintiff's damages is, generally, for the work done, such a proportion of the entire price as the fair cost of that work bears to the fair cost of the whole work, and, in respect to the work not done, such profits as he would have realized by doing so.—KEHOE v. MAYOR, ETC., OF BOROUGH OF RUTHERFORD, N. J., 27 Atl. Rep. 912.

34. CONTRACT—Rescission.—The rescission of a contract must be made by a restoration to each of the parties thereto of that which has been received under it, and, in order to obtain such rescission, all of the parties interested in the property involved must be brought before the court. — CONSTANT v. LEHMAN, Kan., 34 Pac. Rep. 745.

35. CONTRACT—Rescission—Fraud.—Whether a contract alleged to have been obtained by defendant through fraud was ratified by plaintiff after discovery of the fraud is a question for a jury, and in an action to rescind such contract an instruction as to what acts of plaintiff would constitute a ratification is erroneous.—EVANS v. GOGGAN, Tex., 23 S. W. Rep. 854.

36. CONVERSION — Action against Administrator.—When a person sued individually for the conversion of property undertakes to defend as administrator, he must establish by positive averment and proof his status as administrator, and that he is possessed of or entitled to such property, and chargeable therewith, in such capacity, by some appropriate preliminary trial, before the opposite party, or other interested parties, can properly be excluded as witnesses upon the merits of the case.—PREWITT v. LAMBER, Colo., 34 Pac. Rep. 684.

37. CORPORATIONS—Insolvency—Receivers.—Rev. St. art. 1461, authorizing a judge of any court of competent jurisdiction to appoint a receiver for an insolvent corporation, does not empower a stockholder or lien creditor of an insolvent corporation, which is still a going concern, to have a receiver appointed to take charge of the entire assets and convert them into money for general distribution, on the sole ground of insolvency.—ESPUELA LAND & CATTLE CO. v. BINDLE, Tex., 23 S. W. Rep. 820.

38. CORPORATION — Subrogation.—Where a corporation assigns book accounts to its president to indemnify him as indorser of its notes, a receiver of the corporation, thereafter appointed, on paying a note so indorsed, is not entitled to subrogation to the benefit of the indemnity given to the president, and therefore the receiver will not be compelled to pay such note in preference to other claims.—WHITEHEAD v. HAMILTON RUBBER CO., N. J., 27 Atl. Rep. 897.

39. COSTS—Failure to Enter Suit.—Under Pub. St. ch. 155, § 23, which provides that, "if the plaintiff fails to enter and prosecute his action, the defendant shall recover judgment for his costs, to be fixed by the trial justice," where a defendant is summoned to appear to an action in a court to whose jurisdiction he is not subject, and his attorney appears at the time stated in the summons, he is entitled to a judgment for costs therein, though such suit is not entered in such court.—SMITH v. PIKE, Mass., 35 N. E. Rep. 106.

40. COUNTIES—Board of Supervisors.—How. St. § 502, which limits the time of sessions of the board of supervisors, and fixes their compensation, in full, for all services and expenses in attending meetings of the board, and all services and expenses while acting, on any committee of the board, during its session, does not authorize payment for committee work while the board is not in session.—EWING v. AINGER, Mich., 56 N. W. Rep. 767.

41. COURTS—Conclusiveness of Journal Entries.—The entries upon the journal of the District Court are conclusive evidence of its proceedings. If the clerk has not made such entries in conformity with the facts or the rulings of the judge, the remedy is by a correction of the journal by order of the District Court. This court will not substitute a paper certified to be a memorandum of journal entry prepared by the judge of the journal entry itself as it appears in the transcript filed in this court, and certified to be a true transcript of the record.—CHICAGO, B. & Q. R. CO. v. ANDERSON, Neb., 56 N. W. Rep. 794.

42. COURTS — Judge — Disqualification — Evidence.—The fact that the judge has a suit pending against the plaintiff, a corporation, in an action on trial before him, is insufficient to disqualify him on account of interest, where the two actions are entirely independent, and the judgment in the one case will in no way

affect the judgment in the other.—SOUTHERN CALIFORNIA MOTOR ROAD CO. v. SAN BERNARDINO NAT. BANK, Cal., 34 Pac. Rep. 711.

43. COURTS — Disqualification of Judge.—Where, in trespass to try title, the judge in whose court the cause is pending has possession of the land in controversy, claiming title thereto, he is "interested," within Const. art. 5, § 11, providing that "no judge shall sit in any case wherein he may be interested," and is disqualified to try the cause, and the failure of plaintiff, through ignorance, to make him a party, does not change the rule.—CASEY v. KINSEY, Tex., 23 S. W. Rep. 818.

44. COURT—Disqualification of Judge.—A judge who owns property subject to a city tax which is sought to be collected is disqualified to render a judgment enjoining the collection thereof.—WETSEL v. STATE, Tex., 23 S. W. Rep. 825.

45. CRIMINAL LAW — Bail—Release of Sureties.—The sureties on a criminal recognizance for the appearance of a defendant, and to abide the judgment of the court, and not depart without leave, are discharged from further liability, where the defendant has duly appeared, and received sentence, and thereafter has offered and submitted himself to the sheriff, to be taken into custody under the sentence imposed by the court. —JACKSON v. STATE, Kan., 34 Pac. Rep. 744.

46. CRIMINAL LAW—Bill of Exceptions.—Where defendant in a criminal case does not file his bill of exceptions within the time allowed by the court, nor during such time obtain from the court an order, or from the parties a written stipulation, extending the time, the judgment becomes final, and a bill thereafter filed by consent of the court and parties is unavailing. —STATE v. BRITT, Mo., 23 S. W. Rep. 771.

47. CRIMINAL LAW—Burglary.—A buggy house "in which goods, wares, merchandise, and other valuable things are kept and deposited" is a building in which burglary, may be committed, under section 68, ch. 31, Gen. St. 1889.—STATE v. GARRISON, Kan., 34 Pac. Rep. 751.

48. CRIMINAL LAW—Carrying Weapons.—It is no offense to carry a pistol on one's own premises. In a prosecution for carrying a pistol, evidence that defendant separated from the witnesses on arriving at his pasture, he going through the same, while the witnesses went around it, to the place of second meeting, where he was seen with a pistol in his possession, on his own premises, does not prove that he had it in his possession before the separation, where he testifies that he went to his residence, secured the pistol, and carried it with him to the place of second meeting.—WORTHAM v. STATE, Tex., 23 S. W. Rep. 797.

49. CRIMINAL LAW—Consolidating two Cases.—When two indictments, alike in substance and form, are returned against one person, charging him with obtaining money from two different persons at two different times, the two cases cannot be consolidated, and tried as one case.—CUMMINS v. PEOPLE, Colo., 34 Pac. Rep. 734.

50. CRIMINAL LAW—Constitutional Law. —A conviction of simple assault and battery before a justice is no bar to a subsequent prosecution for the same assault and battery to commit felony, within Const. art. 1 § 14, providing that no person shall be put in jeopardy twice for the same offense.—STONER v. STATE, Ind., 35 N. E. Rep. 133.

51. CRIMINAL LAW—Continuance.—It is error to refuse an application by defendant for a continuance of a trial for robbery in order to procure the attendance of a witness by whom defendant expects to prove an alibi, where the witness is too ill to attend court or to have her deposition taken, and the principal question in the case is the identification of defendant as the robber.—STATE v. MADDOX, Mo., 23 S. W. Rep. 771.

52. CRIMINAL LAW—Costs.— The suspension of sentence indefinitely by the court on conviction of misdemeanor and the allowing of defendant to be discharged from his recognizance and to go without day, constitute a "termination of the prosecution," within Act Pa. 1887, which provides that "the costs of prosecution in every case of misdemeanor shall, on the termination of the prosecution by verdict of a traverse jury and sentence of the court, be immediately chargeable to and paid by the proper county."— WRIGHT v. DONALDSON, Penn., 27 Atl. Rep. 867.

53. CRIMINAL LAW—Embezzlement.—An indictment for embezzlement alleging all the necessary ingredients of the crime charged is not vitiated by the improper insertion therein of the evidences of the supposed guilt of defendant.—STATE v. BROUGHTON, Miss., 13 South. Rep. 885.

54. CRIMINAL LAW — Gambling House—Liability of Wife.—When husband and wife reside together, he is the head of the house, whether it be owned by or be rented to the one or the other. When both are present, it is his duty, not hers, to prevent unlawful gaming therein, and, in order to hold her liable criminally for permitting such gaming, it must appear affirmatively that she was active in the granting of permission, not merely that she was passive in the matter, and took no measure to hinder or prevent the game.—BELL v. STATE, Ga., 18 S. E. Rep. 186.

55. CRIMINAL LAW — Hawkers and Peddlers— Who Are.—In pursuance of our statute, the inhabitants of Englewood, in this State, passed an ordinance requiring hawkers, peddlers, and itinerant vendors of merchandise to obtain a license. R, a merchant dealing in groceries in the city of New York, where, for years, he has kept a store, with a stock of groceries, from which he supplies his customers, employed the relator to drive his wagon to his customers in Englewood, and take their orders, and afterwards deliver the goods ordered. The relator did not sell or deliver goods in any other way, and neither he nor R had a license, as required by the ordinance: Held, that the relator was not a hawker, peddler, or itinerant vendor, within the meaning of our statute.—HEWSON v. INHABITANTS OF TOWNSHIP OF ENGLEWOOD, N. J., 27 Atl. Rep. 904.

56. CRIMINAL LAW—Imprisonment.— Gen. St. § 8190, (Mills. Ann. St. § 4271), providing that any person stealing cattle shall be deemed guilty of a felony, and shall be punished by imprisonment, in effect provides the place of imprisonment, it being provided by Const. art. 18, § 4, that the term "felony" shall mean any offense punishable by death or imprisonment in the penitentiary.—IN RE PRATT, Colo., 34 Pac. Rep. 680.

57. CRIMINAL LAW—Larceny. — The possession of stolen goods raises no presumption of defendant's guilt, such possession being merely a circumstance for the jury's consideration in determining the question of his guilt.—HARPER v. STATE, Miss., 13 South. Rep. 882.

58. CRIMINAL LAW—Loss of Indictment.—When, in a motion for a new trial, it is shown to the trial court that the indictment is lost, it is the duty of the prosecution to substitute the lost indictment; and, on failure so to do, the court of criminal appeals will reverse the case. — WOLF v. STATE, Tex., 23 S. W. Rep. 799.

59. CRIMINAL LAW—Verdict—Decree of Guilt.—Under Pen. Code, § 1157, providing that whenever a crime is distinguished into degrees, the jury, if they convict, must find the degree of which the defendant is guilty, the jury are excused from finding the degree though the indictment was for burglary, of which there are but two degrees, and the court instructed that if the jury found the defendants guilty they could find them guilty of no higher offense than burglary in the second degree.—PEOPLE v. BANNISTER, Cal., 34 Pac. Rep. 710.

60. CRIMINAL LAW—Unlicensed Dealer in Pistols.—A pawnbroker, who, in a solitary instance, takes a pistol in pledge for repayment of a loan, and sells it for payment of his debt, is not a dealer in pistols, within

Code 1892, § 3899, providing that dealers in pistols shall pay a privilege tax of $100, and is not subject to the penalty against unlicensed dealers in pistols.—GRAHAM v. STATE, Miss., 13 South. Rep. 883.

62. CRIMINAL PRACTICE—Continuance.—A motion for continuance, in a criminal case, on the ground that the attorney for the accused had not been notified of the trial a sufficient length of time to properly prepare therefor, but which fails to show want of notice by the accused himself, is insufficient.—MAY v. STATE, Neb., 56 N. W. Rep. 804.

62. DECEIT—Reliance on Statements.—In an action for deceit in inducing plaintiff to purchase stock in a corporation by false representations of the officers that $300,000 had been paid in, plaintiff admitting receiving a letter from one of the officers, after the alleged representations and before his purchase of stock, in which it was stated that the corporation owned "$287,000 worth of vessel property, with only about $40,000 to pay on it. Our profits this year will be 30 per cent. at least, divided among the present shareholders, and applied on their stock, bringing their stock up to par value with what they have already paid in cash:" Held, that the letter was notice to plaintiff that the $300,000 had not been paid in.—MCEACHERAN v. WESTERN TRANSPORTATION & COAL CO., Mich., 56 N. W. Rep. 860.

63. DEED — Acknowledgment. — A certificate of acknowledgment of a deed, which states that the person named therein as acknowledging it "personally appeared" before the officer taking it, substantially complies with the statute, which requires the certificate to state that such person is "personally known" to such officer.—WARDER v. HENRY, Mo., 23 S. W. Rep. 776.

64. DEED—Covenants against Incumbrances.—1 Hill's Code, § 1424, provides that a warranty deed containing the words "convey and warrant" shall be construed to contain express covenants by the grantor to the grantee, his heirs and assigns, that the premises are free from all incumbrances, "and such covenants shall be obligatory upon any grantor, his heirs and personal representatives, as fully and with like effect as if written at full length in such deed:" Held, that the statute applies to a deed drawn in the form prescribed by statute, and which set out the exact things warranted by the grantor.—LEDDY v. ENOX, Wash., 34 Pac. Rep. 665.

65. DEED—Delivery.—The finding of the trial court that the deed executed by the plaintiff and deposited in escrow with a third person, to be delivered to the vendee on the performance by the latter of certain conditions, was delivered by the depository in escrow by instructions of the vendor before the conditions of the holding had been complied with, considered to be sustained by the evidence in the case.—EGGLESTON v. POLLOCK, Neb., 56 N. W. Rep. 805.

66. DEED—Description.—A definite description in a deed, naming the point of beginning, the monuments, and courses and distances followed by a statement as to the number of acres conveyed, passes only the quantity of land included in the specified boundaries, though that is less than the number of acres stated.—SILVER CREEK CEMENT CORP. v. UNION LIME & CEMENT CO., Ind., 35 N. E. Rep. 125.

67. DEED—Implied Covenant — Seisin.—Under Code 1892, § 2440 (Code 1880, § 1196), providing that the words "grant, bargain, sell" in a deed shall operate as an express covenant that the grantor was seised of "an estate," there is not an implied covenant that he was seised in fee, though the habendum is, to have and hold "in fee simple."—CUNNINGHAM v. DILLARD, Miss., 13 South. Rep. 882.

68. DEED—Trusts—Joint Stock Company.—A deed in trust for an unincorporated joint-stock company under the company name is not void for want of a beneficiary capable of taking, but the beneficiaries are the shareholders in the company, since a joint-stock company is in effect a co-partnership.—HART v. SEYMOUR, Ill., 35 N. E. Rep. 246.

69. DEED BY COUNTY COMMISSIONERS—Validity.—In conveying the public lands of their county, the execution of a deed thereto by county commissioners was an official act that such boards were expressly authorized by law to perform, and, in the performance of it, the judge of probate, while, under the law, he was, *ex officio*, a member and president of such board, properly acted under his own official title of "judge of probate;" the law, from the official act, and the participation with him therein of other members of the board of county commissioners, acting as such under their official titles, supplying the fact that such judge was acting therein in his capacity as an *ex officio* member of such board.—MARTIN v. TOWNSEND, Fla., 13 South. Rep. 887.

70. DESCENT AND DISTRIBUTION—Half Blood.—Where a husband or wife dies intestate and without issue, seised of non-ancestral real estate or personal property it descends to the relict of such husband or wife, under section 4159 of the Revised Statutes; and such property so descended under section 2 of the act of April 17, 1857, and amendments thereto, when the supplemental act of April 11, 1877, was adopted.—STEMBLE v. MARTIN, Ohio, 35 N. E. Rep. 208.

71. DIVORCE—Alimony.—In ascertaining the amount of alimony to which a wife is entitled, where she is granted a divorce and the custody of the children, it is proper to take into consideration the education of the children as an item of expense.—HENINGER v. HENINGER, Va., 18 S. E. Rep. 193.

72. DOWER—Admeasurement.—A widow is entitled to dower in the interest of her husband in land at the date of his death, where such interest is represented by the amount then due on contracts for the sale of the land, executed by the husband before marriage, and under which the vendees were in possession, both when he married and when he died.—PULLING v. PULLING'S ESTATE, Mich., 56 N. W. Rep. 765.

73. DOWER—Res Judicata.— A person holding land under a deed of conveyance made by a husband during coverture, and in which the wife did not join, is not concluded by proceedings, to which he is not a party, instituted by such wife, after the death of the husband, for setting apart to her a child's part in the land.—REDDICK v. MEFFERT, Fla., 13 South. Rep. 894.

74. DRAINAGE DISTRICTS — Commissioners. — Under Rev. St. 1891, ch. 42, § 117, which declares that owners of land outside a drainage district, who connect their ditches with those of the district, shall be deemed to have applied to be included in the district, and their lands benefited thereby shall be treated, classified, and taxed as other lands in the district, such owners are not entitled to notice of the action of the commissioners annexing their lands to the district.—DRAINAGE DIST. NO. 3 OF MARTINTON TP. v. PEOPLE, Ill., 35 N. E. Rep. 238.

75. EJECTMENT—Title — Prescription.—A plaintiff in ejectment, claiming title to the lands sued for by reason of 10 years' adverse possession thereof, to prevail, must prove a continuous possession of said property under a claim of ownership in himself, and that such possession was actual, visible, notorious, exclusive, and adverse to the owner of the legal title.—SMITH v. HITCHCOCK, Neb., 56 N. W. Rep. 791.

76. ELECTIONS—Buying Votes—Penalties and Prosecution.—Under Elliott's Supp. § 1396, providing that whoever buys a vote thereby becomes liable to the person whose vote is bought for $300 and attorney's fee, the common-law rule that one seeking damages for injury occasioned by the fraud of another must be free from wrong does not prevail.—STATE v. SCHOONOVER, Ind., 35 N. E. Rep. 119.

77. ELECTION—Place of Voting.—Under Act July 2, 1839, as amended by Act April 20, 1854, Act June 19, 1891,

§ 19, where it has been determined by special election to hold elections at a certain farm, the commissioners have no authority to change such place, though there be no adequate room at the farm specified for holding the election, but must erect a temporary building.—IN RE EGLY, Penn., 27 Atl. Rep. 851.

78. ELECTIONS AND VOTERS—Certifying Nomination.—Where nomination papers in apparent conformity to the provisions of the Australian ballot law, nominating a candidate for judge of a judicial district, have been filed with the secretary of State more than 30 days before the day of election, and where such nomination papers have not been held insufficient by the secretary of State, auditor of State, and attorney-general, or a majority of them, it is the duty of the secretary to certify to the county clerk of each county within the judicial district the name and residence of the candidate named in such nomination papers, not less than 15 days before the election, notwithstanding the fact that objections thereto have been filed, and remain undetermined.—SIMPSON V. OSBORN, Kan., 34 Pac. Rep. 747.

79. ELECTION AND VOTERS — Residence — Soldier's Home.— Under Const. art. 7, § 5, providing that no elector shall be deemed to have gained or lost a residence "while kept at any almshouse or other asylum at public expense," a person who becomes an inmate of a soldiers' home gains no residence in the municipality where the home is located, whatever may be his intention on entering it.—WOLCOTT V. HOLCOMB, Mich., 56 N. W. Rep. 837.

80. EMINENT DOMAIN — Second Appropriation. — In Ohio the rule is well established that a second appropriation of lands formerly appropriated to a public use cannot be made when the second approriation is inconsistent with the first, and tends to deprive the corporation first acquiring such public use from the full and free enjoyment thereof.—LAKE ERIE & W. R. CO. V. BOARD OF COM'RS OF SENECA COUNTY, U. S. C. C. (Ohio), 57 Fed. Rep. 945.

87. EQUITY— Injunction—Grant of City Charters.—A court of equity has no power to issue an injunction to restrain the secretary of State from issuing a city charter on the ground that the statute authorizing such charter is unconstitutional.—LARCOM V. OLIN, Mass., 35 N. E. Rep. 113.

82. EQUITY—Jurisdiction—Illegal Contracts of City.—A court of equity has not jurisdiction to entertain a suit by individual taxpayers to restrain a city from carrying out an invalid contract.—STEELE V. MUNICIPAL SIGNAL CO. Mass., 35 N. E. Rep. 105.

83. EQUITY—Rescission of Contract.— In an action to rescind bids for public work for a town, and recover a deposit, where the bill stated as the ground of relief that complainant was misled by mirsepresentations of the town's agents, it cannot be contended on appeal that the bids were informal, and there was therefore no mutuality of contract.—LANGLEY V. HARMON, Mich., 56 N. W. Rep. 761.

84. EQUITY PLEADING — Parties. — Where a corporation is clearly made a party defendant as such to an original bill, it must also be considered a defendant to an amended bill which prays that the "parties defendant" to the original bill be made defendants to the amended bill, and "refers" to the original bill, and "makes the same a part hereof, as if set out herein in *haec verba*;" although the amended bill avers that the said organization was never legally incorporated, and that it was in reality a partnership composed of certain individual defendants doing business under the style of the pretended corporation.—EMPIRE COAL & TRANSP. CO. V. EMPIRE COAL & MIN. CO., U. S. S. C., 14 S. C. Rep. 66.

85. ESTOPPEL IN PAIS— Alteration of Instruments.— Defendant leased a boiler and engine to a firm, which, becoming involved financially, gave plaintiff a bill of sale of its machinery and tools. Defendant, having a copy of said bill of sale, including the boiler and engine, wrote to plaintiff that one C would take the tools and machinery, as per bill of sale, giving plaintiff his note, indorsed by defendant, for a certain sum, which was enough to save plaintiff harmless. C bought the goods accordingly but defendant, when sued on the note, claimed a credit for the value of the boiler and engine, on the ground that they were not included in the bill of sale, but inserted after delivery. It appeared that the goods sold, without reckoning said boiler and engine, were worth more than the amount of the note, and the evidence of the original terms of the bill of sale was not such as to warrant its reformation in equity: Held, that defendant, having induced plaintiff to sell to C, was estopped to claim said credit.—MCCLAIN V. SMITH, Penn., 27 Atl. Rep. 853.

86. ESTOPPEL—Silence— Record as Notice.—A junior chattel mortgagee, who is chiefly instrumental in inducing the senior mortgagee to release his mortgage, and to take another in its stead, without informing him of the existence of the junior mortgage, is estopped from asserting it as a prior lien to that of the second mortgage taken by the senior mortgagee, though the junior mortgage was duly registered. — MORRIS V. HERNDON, N. Car., 18 S. E. Rep. 203.

87. EVIDENCE—Parol Evidence.—The rule which excludes the introduction of parol testimony to vary or contradict a written testimony binds only written parties to the instrument and their privies.— FIRST NAT. BANK OF PLAINFIELD V. DUNN, N. J., 27 Atl. Rep. 906.

88. EXECUTION.—Under Rev. St. art. 1632, allowing an execution, in less than 10 days after rendition of judgment, on the filing of an affidavit that defendant "is about to remove his property out of the county, or is about to transfer or secrete his property for the purpose of defrauding creditors," it is not necessary to state that the property is being removed with intent to defraud creditors.—CLIFFORD V. LEE, Tex., 23 S. W. Rep. 843.

89. EXECUTORS—Sales under Order of Court.—The rule that all the executors named must join in a sale does not apply to executors in whom no power of sale is vested by their appointment, but who obtain the power only from the court; and, though there may be two executors when proceedings for sale of decedent's lands are had, an order for one of them to sell, and a sale reported by him, and confirmed by the court, is sufficient to pass title as against a collateral attack.—CORLEY V. ANDERSON, Tex., 23 S. W. Rep. 838.

90. FEDERAL COURTS — Equity Jurisdiction — State Statutes.—State statutes making equitable rights and remedies enforceable in actions at law cannot affect the equity jurisdiction of the Federal Courts; and in determining whether there is an adequate remedy at law, which will defeat equitable jurisdiction, the inquiry is whether, by the principles of common law and equity, as distinguished and defined in this country and England at the time of the adoption of the Constitution of the United States, the relief sought was obtainable at law, or is such as only a court of equity was fully competent to give.—MISSISSIPPI MILLS V. COHN, U. S. S. C., 14 S. C. Rep. 75.

91. FEDERAL COURTS — Jurisdiction — Citizenship.— Where a suit is brought in a Federal Circuit Court, on the ground of diverse citizenship, to enforce a claim to land situated in the district, defendants, who have voluntarily appeared and submitted their claims to adjudication, cannot afterwards object to the jurisdiction, on the ground that the suit is not brought in the district of the residence of either plaintiffs or defendants.—HATCH V. FERGUSON, U. S. C. C. (Wash.), 57 Fed. Rep. 966.

92. FIXTURES — Between Licensee and Mortgagee.— Where buildings are erected by one having no interest in the land on which they stand, by the permission or licence of the owner of the land, an agreement will be

implied (in the absence of any other facts or circumstances tending to show a different intention) that the buildings shall remain the personal property of him who erects them.—MERCHANTS' NAT. BANK OF CROOKSTON V. STANTON, Minn., 56 N. W. Rep. 821.

93. FORCIBLE ENTRY AND DETAINER—Landlord and Tenant.—Under Rev. St. 1891, ch. 57, § 1, which declares that "no person shall make an entry into lands or tenements except in cases where entry is allowed by law, and in such cases he shall not enter with force, but in a peaceable manner," a landlord has no right to enter the leased premises without the tenant's consent, even though the lease has expired.—PHELPS V. RANDOLPH, Ill., 35 N. E. Rep. 244.

94. FRAUDULENT CONVEYANCES—Delaying Creditors. —The fact that a business corporation mortgages its property to a bank to secure not merely its indebtedness to the bank, but any future advances that the bank may make to it, does not show that it is made to hinder and delay unsecured creditors.—SABIN V. COLUMBIA RIVER LUMBER & FUEL CO., Oreg., 34 Pac. Rep. 692.

95. FRAUDULENT PURCHASES AND TRANSFERS.—Where F obtained goods of defendants on credit, with the intention of not paying for them, for the purpose of transferring them to plaintiffs in payment of debt, his purchase is fraudulent, and gives him no title, and plaintiffs, knowing the facts, get no title against defendants.—BLUM V. JONES, Tex., 23 S. W. Rep. 844.

96. GARNISHMENT — Deposits in Bank.—In garnishment against a bank, it appeared that defendant had been accustomed to deposit with the bank drafts drawn on customers, and receive credit therefor on account, and it was agreed that, if any drafts were dishonored, the bank should charge them back to defendant; he at all times keeping a certain amount on deposit to cover such returned drafts. When process was served on the bank, defendants had an apparent credit on the account, but, before trial, drafts drawn by defendant, amounting to more than his apparent credit, were returned unpaid: Held, that garnishee was not liable.—RICE V. THIRD NAT. BANK, Mich., 56 N. W. Rep. 776.

97. GARNISHMENT — Stock of Foreign Corporation. — The stock of a non-resident in a foreign corporation, held in trust in this State, cannot be garnished in an action in this State.—SMITH V. DOWNEY, Ind., 34 N. E. Rep. 823.

98. GIFT—Delivery. — Testator made various statements indicating an intention to give to his housekeeper certain notes and mortgages held by him. After his death, they were found in her possession, on his premises, unindorsed, and she then claimed he gave them to her two or three days before he died. In a sworn petition for the appointment of a special administrator, she stated that the personal estate consisted of live stock and notes and mortgages. He left no other notes and mortgages than those claimed by her. By a devise, he paid her amply for her services. When the will was read, she stated that it was not as had been represented to her: Held, that the facts failed to show a completed gift and delivery.—BELLIS V. LYONS, Mich., 56 N. W. Rep. 770.

99. HIGHWAY—Obstruction—Appellate Jurisdiction.—An action by a town to recover the penalty imposed by Rev. St. 1891, ch. 121, § 71, for obstructing a public road, involves a freehold, within the meaning of the Illinois statute regulating appeals to the Appellate Court, where the defendant, who owns the fee of the land, disputes the existence of the road, which is alleged to exist by prescription, since the action depends upon the question whether the public has an easement in the defendant's land.—TOWN OF BRUSHY MOUND V. MCCLINTOCK, Ill., 35 N. E. Rep. 159.

100. HIGHWAYS—Proceeding—Notice.—In proceedings to lay out a highway the notice of the time and place of the hearing on the petition is jurisdictional, and must be given in strict conformity to statute, especially where it is only served on a party by posting.—TOWN OF LYLE V. CHICAGO, M. & ST. P. RY. CO., Minn., 56 N. W. Rep. 820.

101. HOMESTEAD—Contract of Sale by Husband.—The contract of the husband, without his wife joining therein, to convey his homestead, is void for all purposes, and the husband is not liable in damages for its non-performance.—WEITZNER V. THINGSTAD, Minn., 56 N. W. Rep. 817.

102. HOMESTEAD — Mortgage by Husband. — Under Civil Code, § 1242, providing that a married person's homestead cannot be incumbered except by the joint act of husband and wife, a mortgage by the husband alone is void, and is not validated by the husband's subsequent acquirement of the homestead by a decree of divorce which assigns it to him, since a subsequently acquired title does not relate back so as to give effect to a void instrument.—POWELL V. PATISON, Cal., 34 Pac. Rep. 677.

103. HOMESTEAD—Probate—Exemption.—The homestead set apart to a widow under Code Civil Proc. § 1465, which provides that if no homestead has been selected in the life-time of the deceased, the Probate Court must select a homestead "for the use of the surviving husband or wife and the minor children," is exempt, not only from the claims of the creditors of the deceased husband, but also from her own debts contracted by her previous to his death.—KEYES V. CYRUS, Cal., 34 Pac. Rep. 722.

104. HOMESTEAD—Waiver.—A householder moved with his family from his homestead to another town, where he engaged in business. He afterwards sold the homestead, without returning to it. He voted in his new residence before he sold his homestead, and swore in his vote on being challenged. The only evidence of his intention to return was his testimony that he did not move with the intention of staying, and that he told his wife that, if he ever got a little ahead, they would go back to the homestead to live: Held, that the evidence justified a finding that he had abandoned his homestead.—JACKSON V. SACKETT, Ill., 35 N. E. Rep. 234.

105. HUSBAND AND WIFE — Community Property.—Civil Code, §§ 1384, 1402, provide that the death of a husband intestate the title to one-half of the community property vests in the surviving wife, subject to the debts and the control of the Probate Court for purposes of administration: Held, that the widow could not by a conveyance of her interest in the land bar a homestead therein for herself and children.—PHELAN V. SMITH, Cal., 34 Pac. Rep. 667.

106. HUSBAND AND WIFE—Payments.—Whether or not a husband had authority to act as his wife's agent in entering into negotiations looking towards the execution of a chattel mortgage on her stock of goods is immaterial where she herself subsequently executed the mortgage, with full knowledge of all the facts.—SCHLOSS V. SOLOMON, Mich., N. W. Rep. 753.

107. HUSBAND AND WIFE—Separate Estate.—Where one, before his marriage conveys property on condition that for the income there be paid him annually a certain amount the amount due him, whether treated as an annuity, or a debt for the purchase money of the property is his separate estate.—KROHN V. KROHN, Tex., 23 S. W. Rep. 848.

108. INDIANS—Citizenship—Federal Courts.—An Indian woman who marries a citizen of the United States, voluntarily takes up a residence apart from her tribe, and adopts the habits of civilized life, becomes a citizen of the United States and of the State in which she resides, and may maintain a suit in the Federal Courts against citizens of other States.—HATCH V. FERGUSON, U. S. C. C. (Wash.), 57 Fed. Rep. 969.

109. INJUNCTION AGAINST JUDGMENT — Dissolution.—Where in an action by a judgment debtor against his creditor and the officers of the county court to restrain the collection of the judgment, plaintiff's ground for

injunction rests primarily on an indebtedness exceeding the judgment, alleged to be due him from the judgment creditor, and the answer specifically denies the existence of such indebtedness, and intelligently avers facts excluding the possibility thereof, it is not error to dissolve the injunction and dismiss the action.—WHEELER v. GRAY, Tex., 23 S. W. Rep. 821.

110. INJUNCTION—Flooding Lands—Railroad Embankments.—Where a railroad company has begun the construction of an embankment across a natural stream, with a culvert insufficient to permit the passage of the water in times of rain and melting snow, an injunction will issue at the suit of a land-owner whose land will be flooded from year to year, and who would otherwise be compelled to bring numerous suits for damages for the continuous injuries.—LAKE ERIE & W. R. CO. v. YOUNG, Ind., 35 N. E. Rep. 177.

111. INSURANCE AGAINST LIABILITIES AS CARRIER.—The policy issued by defendant to plaintiff on the property of shippers construed as an insurance for the benefit of plaintiff only to the extent of its liability as carrier and warehouseman.—MINNEAPOLIS, ST. P. & S. S. M. RY. CO. v. HOME INS. CO., Minn., 56 N. W. Rep. 815.

112. INTOXICATING LIQUOR—Liquor Dealer's Bond.—A liquor dealer's bond, providing for a penalty in case the dealer permits any game prohibited by the laws of the State to be conducted on the premises, must be strictly construed; and the State cannot maintain any action thereon for the penalty when the bond is made payable to the county judge, instead of to the State, as required by Act March 29, 1887.—STATE v. VINSON, Tex., 23 S. W. Rep. 807.

113. INTOXICATING LIQUORS — Screen Ordinance.—Under Rev. St. 1881, § 3333, empowering towns to license, regulate, or restrain the sale of intoxicating liquors, a town cannot pass a penal ordinance requiring the removal of all screens and other obstructions to the view of the interior of saloons.—STEFFY v. TOWN OF MONROE CITY, Ind., 35 N. E. Rep. 121.

114. JUDGMENT—Entry Nunc Pro Tunc.—Where judgment was entered by the territorial court when sitting as a Federal Court in that district, and after statehood the records pertaining to the case, except the book containing the judgment entry, were, pursuant to the enabling act, transferred to the State Court, it was proper for the latter court to enter judgment *nunc pro tunc* on the verdict.—WORK v. NORTHERN PAC. R. CO., Mont., 34 Pac. Rep. 726.

115. JUDGMENT—Confession.—A judgment by confession will not be opened for alleged misrepresentations where the testimony of petitioner is interested and uncorroborated, and is denied by the maker of the alleged misrepresentations, whose testimony is uninterested and supported by other evidence.—STEELSMITH v. CHRISTIE, Penn., 27 Atl. Rep. 879.

116. JUDGMENT — Equitable Relief.—To warrant a court of equity in reviewing a judgment and in enjoining proceedings thereunder, the party seeking the relief must show, not only that injustice has been done him, but also that he was prevented from prosecuting his cause of action, or interposing his defense, by fraud, accident, or the act of the opposing party, wholly unmixed with any fault or negligence of his own; and the diligence required to be used to prevent injury is such as prudent and careful men would ordinarily use in their own causes of equal importance.—WOOD v. LENOX, Tex., 23 S. W. Rep. 812.

117. JUDGMENT — Lien — Sale under Execution.—On partition between heirs, it was agreed that one, whose purpart was of greater value than his interest, should enter into a recognizance to the other heirs to secure them their share. He took possession of the property, and entered into the recognizance, December 19, 1873. After the partition and agreement, in March, 1872, judgment was entered against him, and in May, 1872, all of his interest in the purpart was levied on, and in 1874 was sold: Held, that the judgment, being a lien on the equitable interest, attached to the legal title, which vested when the recognizance was entered into, and the purchaser at the execution sale obtained the debtor's entire title.—ROBISSON v. MILLER, Penn., 27 Atl. Rep. 887.

118. JUDICIAL SALES.—It is the duty of one purchasing land at execution sale which had been devised to the execution debtor to inquire of the executors as to the probable duration of their possession, and, where such inquiry would have shown that the debtor had refused such legacy, the purchaser acquires no title under the sale.—TARR v. ROBINSON, Penn., 27 Atl. Rep. 859.

119. LANDLORD AND TENANT—Leases — Covenant.—A provision in a lease by a corporation of a mill that the lessor will put in a 50 horse power water wheel, "if required by the lessee," does not require the lessee to give to the lessor's board of directors a formal notice that the wheel is required, but it is enough that request is made of its officers in charge of its business.—PEWAUKEE MILLING CO. v. HOWITT, Wis., 56 N. W. Rep. 784.

120. LANDLORD AND TENANT—Improvement by Tenant.—A tenant cannot recover from the landlord for repairs or improvements on the demised premises, not made by request of the landlord, nor under any contract between the parties.—MULL v. GRAHAM, Ind., 35 N. E. Rep. 134.

121. LANDLORD AND TENANT—Renting on Shares.—As against a landlord, who, with the consent of the tenant, has canceled a lease held by the latter to carry on a farm "upon shares," and has in good faith purchased and paid for all rights or interests which the tenant may have had in a crop of grain then growing, or to be grown that season, upon the premises, it is incumbent upon one who claims title to a share of such grain under and by virtue of a chattel mortgage executed and delivered by the tenant before the seed was sown from which such grain was raised to show that said mortgage was executed in good faith, and not for the purpose of defrauding creditors.—FITZPATRICK v. HANSON, Minn., 56 N. W. Rep. 814.

122. LANDLORD AND TENANT—Use and Occupation.—In an action for use and occupation against a tenant holding under a written lease, defendant is estopped to assert that the building of a fence by the lessor across the street in the rear of the premises was an eviction, where defendant continued to occupy the premises after the fence was built.—BEECHER v. DUFFIELD, Mich., 56 N. W. Rep. 777.

123. LIFE INSURANCE — Application. — Where a life insurance policy provides that, "in case any statements or declarations made in the application for the policy are in any material respect untrue, the company may at its option" cancel the policy, a false statement in the application that the applicant had not required the services of a physician during the past seven years will not be construed as a warranty so as to avoid the policy.—UNION CENT. LIFE INS. CO. v. PAULEY, Ind., 35 N. E. Rep. 190.

124. LIFE INSURANCE — Warranties as to Health.—Where an applicant has stated that he is in good health, and that the statements subscribed are true to the best of his knowledge and belief, it is proper to refuse to charge that it is immaterial whether the applicant knew of the existence of the fatal disease (cerebro-spinal meningitis) or not, and that he assumed the whole risk of his answer being true.—HANN v. NATIONAL UNION, Mich., 56 N. W. Rep. 834.

125. LIMITATION OF ACTION—Deposits.—An instrument dated and signed, and expressed as follows: "Received of M the sum of four hundred dollars on deposit,"—is a complete written contract, importing a promise to repay; and the fact that M, suing on it, alleges an oral agreement to repay the money with interest, does not subject it to the statute of limitations applying to oral contracts.—DE VAY v. DUNLAP, Ind., 35 N. E. Rep. 195.

126. LIMITATION — Foreclosure. — Under the act concerning proceedings on bonds and mortgages (Supp. Revision, p. 489), the right of action upon a bond secured by mortgage will not be barred by the lapse of six months after sale of the mortgaged premises in proceedings instituted to foreclose a prior mortgage.—WHEELER V. ELLIS, N. J., 27 Atl. Rep. 911.

127. MALICIOUS PROSECUTION.—In an action for malicious prosecution, where the court has charged that plaintiff must prove, not only that the prosecution was begun by defendants through malice, but also without probable cause, it is not error to refuse a further instruction that plaintiff is not entitled to recover unless defendants had no ground for instituting the prosecution, and were actuated solely by a desire to injure plaintiff. — KEESLING V. DOYLE, Ind., 35 N. E. Rep. 126.

128. MANDAMUS.—*Mandamus* will not lie to compel the district attorney to institute a suit to recover money unlawfully paid out by the board of supervisors, as the court could not compel him to prosecute it, and it will not undertake by *mandamus* what cannot be accomplished.—BOYNE V. RYAN, Cal., 34 Pac. Rep. 707.

129. MANDAMUS TO ENFORCE PRIVATE RIGHTS. — An application for a *mandamus*, as between private persons or corporations, as to matters involving only private rights and liabilities, should be made, in the first instance, in the District Court of the proper county; the accumulation of appeal and error cases in this court rendering it improper for it to exercise jurisdiction in any class of cases wherein it has not exclusive jurisdiction.—STATE V. LINCOLN GAS CO., Neb., 56 N. W. Rep. 739.

130. MANDAMUS TO COURT.—*Mandamus* lies to compel a court to exercise its lawful jurisdiction where it refuses to take jurisdiction or to proceed in the exercise thereof, but not for the correction of errors committed while exercising jurisdiction, nor where, as in this case, it is not shown that an error was committed while exercising jurisdiction. — STATE V. KING, Fla., 13 South. Rep. 891.

131. MANDAMUS—Practice.—Where, on petition to the Supreme Court for *mandamus*, the parties submit the case on petition and answer without replication or proofs or motion for judgment for want of replication, the relator can have no benefit from allegations in the petition disputed in the answer, nor can the respondent avail himself of new affirmative matter alleged in the answer, but the case must be decided upon those allegations of the petition that are admitted by the answer.—PEOPLE V. MAYOR, ETC., OF CITY OF DANVILLE, Ill., 35 N. E. Rep. 154.

132. MASTER AND SERVANT—Assumption of Risk.—In an action against a railroad company for the death of the manager of a switch engine in defendant's yard, where he had been employed for two years, caused by the absence of a block between the rails abutting on a "stub switch," the complaint alleged that the switch had not been blocked for five days before deceased was killed; that he was free from negligence, and "did not then know the switch was not blocked:" Held, that the complaint was insufficient, in that it failed to show that deceased did not know of the absence of the block previous to the hour of his death, since, if he had such knowledge, he assumed the risk incident to such absence.—AMES V. LAKE SHORE & M. S. RY. CO., Ind., 35 N. E. Rep. 117.

133. MASTER AND SERVANT—Defective Appliances.—In an action by a brakeman against a railroad company for personal injuries caused by a defective brake shaft, the complaint must allege that defendant knew, or with reasonable diligence could have discovered, the defective condition of the brake shaft.—LAKE SHORE & M. S. RY. CO. V. KURTZ, Ind., 35 N. E. Rep. 201.

134. MASTER AND SERVANT — Fellow-servants. — Defendants, employing plaintiff as a laundress, sent for her by a wagon driven by their coachman, who, in turning round a corner, threw her out: Held, that said transportation was incident to her employment, and the rule as to fellow-servants obtained.—MCGUIRK V. SHATTUCK, Mass., 35 N. E. Rep. 110.

135. MASTER AND SERVANT—Negligence—Risks of Employment.—Where a servant is ordered by his master to do work outside of his regular duties, and bringing him into contact with a different class of fellow-servants, the latent risks incident to the new work are, as to him, extrahazardous, because additional to the risks of his regular duties.—CONSOLIDATED COAL CO. OF ST. LOUIS V. HAENNI, Ill., 35 N. E. Rep. 162.

136. MASTER AND SERVANT — Negligence of Co-employee.—A bridge carpenter employed by a railroad company in loading timbers on a railroad car for transportation to another point on the company's line may recover damages from the company, under section 93, ch. 23, Gen. St. 1889, for injuries sustained while so employed, occasioned by the negligence of a co-employee. —CHICAGO, K. & W. R. CO. V. PONTIOUS, Kan., 34 Pac. Rep. 739.

137. MASTER AND SERVANT — Negligence—Dangerous Premises.—A railroad company which sets a laborer to work near an overhanging embankment, with knowledge on the part of its foreman that there is a crack in the embankment, conspicuous from the rear, but not visible from the front, is liable to the laborer for injuries sustained from the falling of the embankment, since it failed to provide him with a safe place in which to work.—ELLEDGE V. NATIONAL CITY & O. RY. CO., Cal., 34 Pac. Rep. 720.

138. MASTER AND SERVANT — Notice of Prior Negligence.—The fact that an engineeer once ran his train in 40 minutes over a distance scheduled for an hour, though he knew that hand cars and sectionmen might be on the track up to 10 minutes before schedule time, no accident having in fact occurred, does not show that he was unfit for his position, and that the company ought to have discharged him after notice.—HOLLAND V. SOUTHERN PAC. RY. CO., Cal., 34 Pac. Rep. 666.

139. MASTER AND SERVANT—Negligence—"Safe Place." —Neglect of the servant in charge of a train, part of which was standing on the track, detached from the engine, to warn an approaching train, is not a breach of the master's duty to furnish a "safe place," entitling an injured employee to recover.—JENKINS V. RICHMOND & D. R. CO., S. Car., 18 S. E. Rep. 182.

140. MEASURE OF DAMAGES—Breach of Contract.—The rule that the measure of damages for failure to deliver an article sold is the difference between the market price of the article at the time and place for delivery and the contract price does not apply where the article was to be prepared for a special purpose, as in case of lumber of a particular grade cut into strips for a particular purpose, as the article in such case has no market value.—DEN BLEYKER V. GASTON, Mich., 56 N. W. Rep. 763.

141. MEASURE OF DAMAGES — Injuries to Married Woman.—Loss of earnings is a proper element of damages for personal injuries to a married woman, since the statute provides that the wages due her for her separate labor shall constitute her separate estate.—SMITH V. CHICAGO & A. R. CO., Mo., 23 S. W. Rep. 784.

142. MEASURE OF DAMAGES — Personal Injuries. — Where there is evidence, in an action for personal injuries, that plaintiff had used drugs and medicines, but no proof of the cost of them, a charge to the jury to consider the expense of medicines, in estimating damages, is prejudicial error.—ATCHISON, T. & S. F. R. CO. V. CLICK, Tex., 23 S. W. Rep 833.

143. MEASURE OF DAMAGES—Wrongful Seizure—Execution.—For seizing plaintiff's property under execution against a third person, the measure of damages is the market value of the property at the time and place of the levy, with 8 per cent. interest thereon.—RICHARDSON V. JANKOFSKY, Tex., 23 S. W. Rep. 815.

144. MECHANICS' LIENS—Additions.—On the side of, and attached to, a two-story building 60x22 was erected a two-story building 80x28. The partitions in the upper story of the old part were taken out, its roof and the upper story of the wall next the new part were taken off, the studdings of the old part were raised to be on a level with those of the new part, and all was inclosed under one roof, the upper floor on both parts being used as a single hall: Held, that a mechanic's lien should be filed as for an addition or alteration, and not for a new erection.—SMYERS v. BEAM, Penn., 27 Atl. Rep. 884.

145. MECHANICS' LIENS.—A material-man's right to a lien does not depend on the contractor's right to recover against the owner, but he is entitled to a lien where he furnished materials on the credit of the structure in which they were to be used, and the materials were of the kind and quality specified in the contract between the owner and the contractor.—LINDEN STEEL CO. v. ROUGH RUN MANUF'G CO., Penn., 27 Atl. Rep. 895.

146. MECHANICS' LIENS — Consent of Landowner. — One in possession of land under a contract of sale employed petitioner to erect a building thereon. The owner of the land knew that the building was being erected for defendant, but did not know who was doing the work, and petitioner did not know to whom the land belonged: Held, that the owner's silence, under such circumstances, did not show his consent to the erection of the building, within the meaning of Pub. St. ch. 191, § 1, making the consent of the owner of the building to the performance of labor thereon necessary to the existence of a lien for such labor.—SAUNDERS v. BENNETT, Mass., 35 N. E. Rep. 111.

147. MECHANICS' LIENS—Mining Claims.—Under Code Civil Proc. § 1183, providing that mechanics, material men, etc., performing labor or furnishing material in the construction of any building or other structure, shall have a lien upon the property upon which they have bestowed labor or furnished materials, and that any person who performs labor on any mining claim has a lien upon the same, a lien for material furnished for structures on a mining claim, to be used in operating the same, filed against the structures, is invalid, as it must be filed against the whole claim.—WILLIAMS v. MOUNTAINEER GOLD MIN. CO., Cal., 34 Pac. Rep. 702.

148. MINING CORPORATIONS—Capital Stock.—How St. § 4093, provides that the directors of mining and smelting companies may call in subscription to the capital stock as they think proper; that, in case of failure to pay, the stock may be sold, and any surplus refunded to the owner of the stock: Held, that an assessment could also be enforced by personal judgment or decree against a stockholder.—ATLANTIC DYNAMITE CO. v. ANDREWS, Mich., 56 N. W. Rep. 858.

149. MORTGAGE — Foreclosure Sale. — A foreclosure sale and payment of the purchase price, which fail to pass the legal title to the land owing to a misdescription in the advertisement and deed, do not operate as a discharge of the debt and mortgage, but give the purchaser an equitable right to the security of the mortgage for the amount of the mortgage debt. — LANIER v. MCINTOSH, Mo., 23 S. W. Rep. 787.

150. MORTGAGES — Foreclosure — Redemption. — Although, under the statute, the purchaser of mortgaged premises on foreclosure sale is entitled to rents of the premises or the value of the use and occupation from the time of the sale until redemption, a receiver will not be appointed for the premises before the expiration of the period allowed for redemption, even though the mortgagor is insolvent, as the latter, until then, is entitled to the possession.—WEST v. CONANT, Cal., 34 Pac. Rep. 705.

151. MORTGAGES—Preferring Creditors.— An instrument executed by an insolvent, purporting to convey absolutely all his property to a trustee, and which states that it is "to secure," and is "intended as a mortgage to secure," debts due a part only of his creditors, and authorizes the trustee to sell the property, and prefer certain of such creditors, is a valid mortgage with power of sale, and not a general assignment. —LAIRD v. WEIS, Tex., 23 S. W. Rep. 864.

152. MORTGAGES—Release of Lien.—Where the holder of a second mortgage consents to the sale of the timber on the mortgaged property, and accepts the purchase money, he releases the timber from the lien of his mortgage, and his judgment on the first mortgage, against the mortgagor purchased by the holder of the second mortgage cannot be used to enforce payment of the second mortgage out of the timber so released. —PRATT v. WATERHOUSE, Penn., 27 Atl. Rep. 855.

153. MORTGAGES—Where a mortgage made in the form of a trust deed conveys real estate to a trustee for the benefit of a third party, to secure the payment of an indebtedness to such third party, the latter may maintain an action in his own name to recover the debt, and to foreclose the mortgage given to secure the same.—HUTCHINSON v. MYERS, Kan., 34 Pac. Rep. 742.

154. MUNICIPAL CORPORATIONS—Aid to Railroads.—County Bonds.— Where a State constitution permits counties to donate their bonds, not exceeding a certain percentage on the assessed valuation to railroad companies, a donation in excess of the prescribed percentage is void *in toto;* and the bondholders have no equity to recover any amount whatever on the theory that the county received a consideration in the construction of the railroad, and should therefore pay so much on the bonds as it might lawfully have donated.—HEDGES v. DIXON COUNTY, U. S. S. C., 14 S. C. Rep. 71.

155. MUNICIPAL CORPORATION — Defective Streets — Negligence.—A city which permits an iron gutter crossing, over a much traveled street, to become worn smooth and slippery, by long use, which condition continues for 10 months, is guilty of negligence rendering it liable to a traveler who is injured by a fall while walking on such crossing.—LYON v. CITY OF LOGANSPORT, Ind., 35 N. E. Rep. 128.

156. MUNICIPAL CORPORATION—Election and Appointment—Ordinances.—One elected chief of the fire department of a city of the fifth class under an ordinance providing that he shall be elected annually by members of the department, is not entitled to hold the position for the year, an ordinance having in the meantime been passed, to take effect immediately, providing for the appointment of the chief of the fire department by the board of trustees.—HIGGINS v. COLE, Cal., 34 Pac. Rep. 679.

157. MUNICIPAL CORPORATION—Defect in Sidewalk—Contributory Negligence.—The fact that one uses a sidewalk, in ordinary use by the public, with knowledge of a defect therein, instead of taking another route to his destination, does not constitute negligence.—BALL v. CITY OF EL PASO, Tex., 23 S. W. Rep. 835.

158. MUNICIPAL CORPORATION—Local Improvements —Ordinances.—Under Rev. St. ch. 24, art. 9, § 19, as amended June 17, 1887, which declares that a description of a proposed local improvement may be made "either by setting forth the same in the ordinance itself or by reference to maps, plans, plats, profiles, or specifications thereof on file in the office of the proper clerk, or both," it is sufficient if the character and description of the improvement, so far as not stated in the ordinance itself, are set forth therein by reference to plans and specifications on file in the city clerk's office.—CALLON v. CITY OF JACKSONVILLE, Ill., 35 N. E. Rep. 223.

159. MUNICIPAL CORPORATIONS — Power to Vacate Streets.—Rev. St. 1891, ch. 24, § 62, cl. 7, authorizing municipal corporations to alter and vacate streets, does not empower them to vacate part of a street to enable the owner of the adjoining lot to use such part of the street for an area way to his building, since the municipality, as trustee for the public, can only vacate a street when it is no longer required

for the public use and convenience.—SMITH v. MCDOWELL, Ill., 35 N. E. Rep. 141.

60. NEGLIGENCE — Barbed-wire Fences. — Maintenance of a barbed-wire fence on one's premises along a highway, though in a city, if not prohibited by ordinance, is not negligence *per se*, and in the absence of other evidence showing it a nuisance, its owner will not be liable for injury to stock occasioned thereby.—ROBERTSON v. WOOLEY, Tex., 23 S. W. Rep. 828.

161. NEGLIGENCE — Defective Bridge — Proximate Cause.—Plaintiff, while attempting to hold his horses, one of which had got its foot in a hole in defendant's bridge, till assistance for which he had sent should arrive, was injured by the struggle of the horse: Held, that the defendant's negligence in failing to keep the bridge in repair was the proximate cause of the injury.—LADUKE v. TOWNSHIP OF EXETER, Mich., 56 N. W. Rep. 851.

162. NEGLIGENCE — Negligent Mining.—In an action for injury to plaintiff's land, resulting from a subsidence of the surface, caused by the negligent working of a coal mine beneath it, it appeared that defendant, who owned the mine, had leased it to others, who paid him a royalty on the coal taken out, but that he gave frequent and explicit directions as to taking coal from the pillars and supports, saying that too much coal had been left. The managers of the mine testified that, under defendant's directions, he continued to take out coal till the mine "shut in:" Held, that there was sufficient evidence of defendant's liability for the injury to go to the jury.—KISTLER v. THOMPSON, Penn., 27 Atl. Rep. 874.

163. NEW TRIAL — Evidence.—An application for a new trial, upon the ground of the insufficiency of the evidence to support the verdict, is addressed to the sound discretion of the trial judge, and his discretion will only be reviewed by this court in case of manifest abuse of that discretion.—HODGES v. BIERLEIN, S. D., 56 N. W. Rep. 811.

164. NEGOTIABLE INSTRUMENT—Notes—Memoranda.—A note executed by J to E, whose estate he managed under a power of attorney had indorsed thereon, "Invested in government bonds, at 4 per cent. belonging to E:" Held that, in the absence of any other evidence except receipts from E to J for interest on the note, J was indebted to E on the note, and did not hold, in trust for E, government bonds standing in the name of J.—IN RE GILMOR'S ESTATE, Penn., 27 Atl. Rep. 845.

165. NUISANCE — Profane Swearing on Street.—An indictment alleging that defendants did, on the public streets and highways, profanely curse and swear, and take the name of God in vain, to the evil example and to the common nuisance of the good citizens of the State, does not charge a common nuisance, in the absence of any averment that the utterances were in the presence of citizens and in their hearing, and that the manner and occasion of making them were of the offensive and annoying character necessary to make them a public nuisance.—COMMONWEALTH v. LINN, Penn., 27 Atl. Rep. 843.

166. PARENT AND CHILD—Deed.—Where a father buys land in the name of his child no resulting trust arises, but the transaction is presumed to be a gift.—FRANCIS v. WILKINSON, Ill., 35 N. E. Rep. 150.

167. PARENT AND CHILD—Compensation for Services.—Where a parent, who lives in her own house until she is compelled by illness to go to the house of her son for care, is taken care of by the son until her death, with the mutual understanding that the son is to be paid for his services, there is a valid implied contract on her part to pay therefor.—SWITZER v. KEE, Ill., 35 N. E. Rep. 160.

168. PARTITION — Ambiguity — Parol Evidence.—In trespass to try title to a tract of 519 acres, it appeared that, on partition of an estate embracing two tracts, one abstract, No. 195, containing 519 acres, the other abstract, No. 196, containing 477, one of the tracts was set apart to plaintiff, the other to defendant, the report of the commissioners and the decree of the court describing them as abstract No. 195 containing 477 acres, and abstract No. 196 containing 519 acres: Held that, there being a latent ambiguity in the descriptions, Parol evidence was admissible to explain the decree by showing which tract was intended for plaintiff and which for defendant.—BARCLAY v. STUART, Tex., 23 S. W. Rep. 799.

169. PARTITION — Recognizance.—Where a married woman, through the agency of her husband, joins in a partition proceeding, the taking of title in the husband's name to the purpart selected by him, and the execution in his own name of the recognizance given to secure the owelty, has the same effect on her as if she had herself accepted the purpart and executed the recognizance; and a sheriff's sale under the recognizance for non-payment of the owelty passes her entire interest, not only in the purpart set off to her, but in the other purparts as well, and she cannot thereafter maintain ejectment for any part of the land.—BARKLEY v. ADAMS, Penn., 27 Atl. Rep. 868.

170. PARTITION — Tenant in Common.—Tenants in common, in surveying and platting their land for a town, by mistake included land adjoining theirs, and omitted from the plat a portion of theirs. They afterwards partitioned the land among themselves by lots, and certain creditors of one of them (B) purchased his lots at sheriff's sale. Some of these were on the land not owned by such tenants, and the title failed: Held, that such creditors were not entitled, in partition, to have set apart to them the interest of B in that part of the land of such tenants which was omitted from the plat, to compensate them for their loss on account of such failure of title.—WILLIS v. ROBINSON, Tex., 23 S. W. Rep. 922.

171. PARTNERSHIP — Dissolution and Accounting.—Where, in an action for the dissolution of an alleged partnership between plaintiff and defendant and for an accounting, it appears that plaintiff gave defendant a complete bill of sale of all the merchandise for which plaintiff asks an accounting, and delivered possession thereof to defendant, who sold it with plaintiff's concurrence, and that an agreement for an accounting was had, and the receipt of all dues admitted by plaintiff, the complaint was properly dismissed.—GIBSON v. GLOVER, Colo., 34 Pac. Rep. 687.

172. PARTNERSHIP—Power to Contract.—A partner cannot *prima facie* bind the firm by a lease of a house for himself and family, and, where the other partner denies that he signed the lease or authorized its execution, the lessor has the burden to prove the authority of the signor.—KOCH v. ENDRISS, Mich., 56 N. W. Rep. 846.

173. PARTNERSHIP— Warranty.—A bill of sale, under seal, containing a warranty, signed by one partner, in the firm name, with the previous assent of his co-partners, is a partnership obligation, in suit upon which all the partners should be joined as defendants.—EDWARDS v. DILLON, Ill., 35 N. E. Rep. 135.

174. PATENTS FOR INVENTION — Invention by Employee.—The fact that an invention is made by an employee after a long series of experiments conducted at his employer's expense, and that he thereafter remains in the employment for many years, with full knowledge that the employer is applying the invention to its manufacturers, raises an indefeasible implied license in favor of the employer, and the inventor cannot thereafter sue him for infringement.—LANE v. BOBLEY CO. v. LOCKE, U. S. S. C., 14 S. C. Rep. 78.

175. PLEADING—Counterclaim —Tort and Contract.—In an action by a tenant against the landlord for the conversion of a crop grown on the demised premises, the fact that the crop came into existence as an incident to the lease in no way makes the conversion of the crop relate to the lease, so as to enable the land-

lord to counterclaim for breach of the condition in the lease.—CROWE v. KELL, Ind., 35 N. E. Rep. 186.

176. PLEADING—Striking Out. — A defendant has a right to set up his entire defense, and where such defense consists of a series of acts, which together constitute one transaction, a portion of the same cannot be striken out, against his objections.—HOVELAND v. BURROWS, Neb., 56 N. W. Rep. 800.

177. PLEDGE.—An instrument termed a "bill of sale," executed by C, authorizing I to take and sell the articles therein specified till C's debt to I is satisfied, when the residue shall be returned to C, and reciting that it is given as security for the debt, is a contract for a pledge, within Civil Code, § 2987, providing that every contract by which the possession of personal property is transferred as security, only, is a pledge.—IRWIN v. MCDOWELL, Cal., 34 Pac. Rep. 708.

178. PRINCIPAL AND AGENT— Powers—Ratification.—Defendant railroad company agreed with T, the promoter thereof, that he should build its road for a stipulated amount; and on the same day defendant's president and vice-president and T entered into an agreement reciting that the contract of construction should be let to T, and that all the parties to such agreement were equally interested with T in such contract, and that T, in taking it, should act in the interest of all parties. Thereafter, T made an agreement with D, under which the latter was to construct the road: Held, that had authority to empower another to contract for supplies for the construction of the road.—HIRSCHMANN v. IRON RANGE & H. B. R. Co., Mich., 56 N. W. Rep. 842.

179. PRINCIPAL AND AGENT—Acts of Agent—Ratification.—Ratification by a principal of an unauthorized contract made by his agent relates back to the beginning of the transaction, and, when deliberately made, with a knowledge of the circumstances, cannot be recalled.—ROSS v. TELFENER, U. S. C. C. (Tex.), 57 Fed. Rep. 973.

180. PUBLIC LANDS—Homestead Rights.— The right to enter a soldier's additional homestead under Rev. St. § 2306, is an absolute right, not subject to the restrictions of the homestead act, and is assignable before entry made.—POURIER v. BARNES, U. S. C. C. (Minn.), 57 Fed. Rep. 956.

181. PUBLIC LANDS—Oklahoma Town-Site Act.—Under the special town-site act for Oklahoma territory (56 Stat. 109, ch. 207), the issuance of a patent to the town-site trustees appointed by the secretary of the interior is not a final disposition of the government's title and control, but is a conveyance in trust, to be carried out by the trustees under the control of the secretary; and, although the act devolved upon the trustees the duty of determining adverse claims to lots, the secretary had power to provide for appeals therefrom to the commissioner of the general land office, and finally to himself; and the pendency of such appeals deprives the trustees of power to make conveyances of the lots in controversy, and consequently *mandamus* will not lie to compel them thereto.—MCDAID v. TERRITORY OF OKLAHOMA, U.S. S. C., 14 S. C. Rep. 59.

182. QUIETING TITLE—Parties.—In an action to quiet title to land purchased by plaintiff from a judgment debtor, and alleged to be exempt from execution, the sheriff who levied on the property as being subject to the judgment is not a necessary party, since he has no interest in the suit.—KING v. EASTON, Ind., 35 N. E. Rep. 181.

183. RAILROADS—Accidents at Crossings. — The view of the track being admittedly obstructed by cars on a sidetrack, and lumber piled both on and off the right of way, the question where plaintiff should have stopped to look and listen is for the jury, and the court cannot decide it as a matter of law.—SMITH v. BALTIMORE & O. R. Co., Penn., 27 Atl. Rep. 847.

184. RAILROAD COMPANY — Accident — Negligence.—Plaintiff, approaching a railroad crossing, listened for a train which he expected, and after it had passed, while he was 100 feet from the track, he drove forward, without looking in the direction from which the train had come until he was within 10 feet of the track, though he could have seen along the track when 35 feet from it: Held, in an action for injury from a train running 12 seconds behind the first, at 15 to 20 miles an hour, without any signal, that plaintiff's failure to look was not negligence, *per se*.—GRAND RAPIDS & I. R. Co. v. COX, Ind., 35 N. E. Rep. 183.

185. RAILROAD COMPANY—Connecting Carriers—Contracts.—Rev. St. art. 4251, obliges railroad companies, for a reasonable compensation, to draw over their road the merchandise and cars which may enter and connect with their railroad. Plaintiff showed that the bill for his goods was a through bill of lading, that the delivering company's line did not reach the place of shipment, but that rates were made over its line and connecting lines to and from that point; that said company issued an expense bill, when the goods arrived, for the exact amount called for by the bill of lading; that the car containing the goods came through from the place of shipment: Held, that these facts were not enough to prove conclusively a contract of agency or partnership between the companies, nor a ratification by the delivering company, so as to bind it to the freight rate named in the bill of lading.—FT. WORTH & D. C. RY. CO. v. JOHNSTON, Tex., 23 S. W. Rep. 827.

186. RAILROAD COMPANY—Highways — Obstruction.—Rev. St. 1881, § 2170, provides that a conductor or other person having charge of a freight train, who suffers it to remain standing across a highway, street, or alley, or who, when it becomes necessary to stop a train across such way, fails to leave a space of 60 feet, shall be fined: Held, that an affidavit charging that a conductor did unlawfully suffer a train to remain standing across a street, and did fail to leave a space of 60 feet across said street, was not bad for duplicity.—STATE v. MALONE, Ind., 35 N. E. Rep. 198.

187. RAILROAD COMPANIES—Fires.—Under Act March 31, 1887, making railroad companies liable for loss from fire started by their engines, no negligence on the part of one whose property is destroyed is to be considered unless he knowingly or purposely placed his property where sparks would be likely to ignite it, or, being present, suffered it to remain in proximity to a fire in actual progress, without effort to protect it; and, in the absence of evidence of such neglect, an instruction on contributory negligence is properly refused.—UNION PAC., D. & G. RY. CO. v. WILLIAMS, Colo., 34 Pac. Rep. 732.

188. RAILROAD COMPANIES — Fires. — In an action against a railroad company for damages from fires set on its right of way, the court properly refused to charge that defendant had a right to kindle such fire to burn off the right of way, if it used reasonable care to prevent it from spreading and injuring the property of others.—GULF, C. & S. F. RY. CO. v. CUSENBERRY, Tex., 23 S. W. Rep. 851.

189. RAILROAD COMPANIES — Negligence. — Where a child—to whom negligence is not imputable, by reason of his tender years and lack of discretion—goes upon a railroad track in consequence of the failure of the railroad company to fence the same as required by statute, and is killed by an engine, the parents of the child exercising at the time ordinary care in the premises, the railroad company is liable.—CHICAGO, B. & Q. R. CO. v. GRABLIN, Neb., 56 N. W. Rep. 796.

190. REAL ESTATE AGENT — Commissions. — Though, under Civil Code, § 1624, a parol contract employing a broker to sell land is invalid, a broker employed to sell or exchange land, and the personalty thereon, under an agreement for a commission of 5 per cent, on the price, may, on bringing about an exchange, recover 5 per cent. on a separate valuation placed on the per-

sonalty by the principal, though in the exchange, as between the parties thereto, there may have been no division of the consideration, as the contract, in such case, is divisible, and that part as to the land is not unlawful, but merely incapable of enforcement. — PORTER V. FISHER, Cal., 34 Pac. Rep. 700.

191. RECEIVERS—Preservation of Estate.—A court of equity has power to authorize a receiver of a waterworks company to incur an indebtedness to continue the operation of the works, and to make it a charge upon the body of the estate, with priority over a pre-existing mortgage. — ELLIS V. VERNON ICE, LIGHT & WATER CO., Tex., 23 S. W. Rep. 858.

192. REMOVAL OF CAUSES—Federal Question—Federal Receiver.—Whether the liability of the sureties on the bond of a receiver appointed by a Federal Court is joint or several does not involve a federal question, within the meaning of the removal acts of congress, since the liability of the sureties depends, not on any law of congress, but on the proper construction of the bond itself.—UNITED STATES V. DOUGLAS, N. Car., 18 S. E. Rep. 202.

193. REPLEVIN—Certificate of Deposit.—Repelvin will lie to recover a certificate of deposit payable to and indorsed by plaintiff, and delivered to defendant, to be used conditionally in purchasing property for plaintiff, but which was not used.—ROBINSON V. STEWART, Mich., 56 N. W. Rep. 852.

194. REPLEVIN — Possession of Property.—An action of replevin will not lie against one who, at the time the action was instituted, was neither in the actual nor constructive possession or control of the property, unless he has concealed, removed, or disposed of the same for the purpose of avoiding the writ.—DE PRIEST V. MCKINSTRY, Neb., 56 N. W. Rep. 806.

195. RES JUDICATA — Pending Actions.—Under Code Civil Proc. § 1049, declaring that "an action is to be deemed pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied," the judgment cannot, during such time, be pleaded in bar of another action.—STORY V. STORY & ISHAM COMMERCIAL CO., Cal., 34 Pac. Rep. 675.

196. SALE—Action for Price.—In an action on a note given for the exclusive right to use a patented article within a certain territory, defendant set up a claim for damages on the ground that others were entitled to use the article within the specified territory: Held, that defendant was properly allowed to testify that plaintiff's agent told him that, as soon as he was ready to use the patented article, the other people would have to "get out" of the territory; that the purchase was made with that understanding, and that it would not have been made if defendant had known that others had such right.—DAVIS V. DAVIS, Mich., 56 N. W. Rep. 774.

197. SALE — Breach of Contract.—Where one who agreed to buy an article to be manufactured, repudiates the contract without cause before delivery, the measure of damages is the difference between the contract price and the value of the article where the seller received notice that the buyer repudiated the contract.—TUFTS V. STEWART, Tex., 23 S. W. Rep. 834.

198. SALE — Conditional Sale.—A written contract, whereby a vendor of articles of personal property, like wagons, cultivators, plows, harrows, and drills, agrees to deliver a lot of such articles to a retail dealer for sale, containing the provision "that the ownership of the personal property shipped under the contract is to remain in the vendor until they are fully paid for in cash," is an instrument in writing, evidencing the conditional sale of personal property.—MOLINE PLOW CO. V. WITHAM, Kan., 34 Pac. Rep. 751.

199. SALE OF STANDING TIMBER—Removal.—A contract for the purchase of standing timber provided that the buyer should cut and remove it within five years, and that all remaining after that time should revert to the seller: Held, that timber cut within five years, but not carried away from the land, reverted to the seller, and that the buyer had no lien thereon for labor performed.—GAMBLE V. GATES, Mich., 56 N. W. Rep. 854.

200. SALE—Stock Animals—Possession.—Sayles' Civil St. art. 4564, provides that persons may dispose of stock animals as they run in the range by sale and delivery of the brands and marks, but for the purchaser to acquire title his transfer shall be recorded: Held, that where there was actual delivery of the cattle, title passed, though the bill of sale, describing them in certain marks and brands, was not recorded.—FIRST NAT. BANK OF COLORADO V. BROWN, Tex., 23 S. W. Rep. 862.

201. SHERIFFS — Compensation.—The sheriff is *ex officio* jailer of his county. He may, if he so elect, appoint a jailer who shall be a deputy, and take the oath required by law. The jailer is not paid a salary, but is allowed for the board and care of prisoners actually confined in the jail.—KYD V. GAGE COUNTY, Neb., 56 N. W. Rep. 799.

202. SCHOOL DISTRICTS — Contracts—Rescission.—To show rescission by a school district of a written contract in pursuance of a contemporaneous parol contract, a resolution of the school board, on which notes of rescission was given, is admissible, it being no objection thereto that the other party to the contract was not present at the passing of the resolution.—SIDNEY SCHOOL FURNITURE CO. V. SCHOOL DIST. OF WARSAW TP., Penn., 27 Atl. Rep. 856.

203. SPECIFIC PERFORMANCE—Contract—Conditions.—Where time is made of the essence of a contract to sell land, but the parties for several years do not treat it as such, and the vendor seems to treat the transaction as an investment on which she is satisfied to receive the interest, she cannot claim a forfeiture, as provided by the contract, for failure of the vendee to make payments at the times stipulated therein.—ROBINSON V. TRUFANT, Mich., 56 N. W. Rep. 769.

204. SPECIFIC PERFORMANCE—Mutuality.—The remedy by specific performance is not a matter of a strict right, but of sound judicial discretion, and will be granted or denied, as the justice and right of the particular case shall seem to the court, on full consideration of the rights and equities of the parties, to require.—TEN EYCK V. MANNING, N. J., 27 Atl. Rep. 900.

205. TAXATION — County — Constitutional Law.—An ordinance passed by county supervisors, imposing a license tax on persons engaged in sheep raising in the county, is authorized by County Government Act, § 25, subd. 27, conferring on the supervisors power "to license, for purposes of regulation and revenue," all legal business carried on in a county, which provision is not in conflict with, but authorized by Const. art. 11, § 12, prohibiting the legislature from imposing taxes on counties for county purposes, but permitting it by general law to vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.—EL DORADO COUNTY V. MEISS, Cal., 34 Pac. Rep. 716.

206. TAXATION—Exemptions—Cemeteries.—Courts of equity have jurisdiction to enjoin the collection of taxes assessed on exempt property, even though the owner has not endeavored to avoid the tax either before the municipal authorities or in the county court, on application for judgment for defendant taxes.—ROSEHILL CEMETERY CO. V. KERN, Ill., 35 N. E. Rep. 240.

207. TAXATION — Sawlogs—Uniformity.—Under Laws 1891, ch. 473, § 2, logs become assessable in the district in which is the mill where they are to be manufactured only on the filing of the affidavit and statement in the district where the logs are banked.—STATE V. BELLEW, Wis., 56 N. W. Rep. 782.

208. TAXATION — School—Limitation.—Under Rev. St. 1891, ch. 122, art. 8, § 1, which limits taxes for school purposes to 2 per cent. of the taxable property, "the valuation to be ascertained by the last assessment for State and county taxes," the assessment referred to is not that for the preceding year, but that for the current year, although such assessment is still incomplete

when the first step towards levying the school tax must be taken.—WABASH R. CO. v. PEOPLE, Ill., 35 N. E. Rep. 157.

209. TAX SALE—Lien.—The provisions of Gen. Laws 1874, ch. 2, § 28, giving a purchaser at tax sale a lien for taxes paid after the sale, apply only to cases where the sale is declared void by reason of "something occurring or omitted subsequent to the entry of the judgment directing the sale."—PFEFFERLE v. WIELAND, Minn., 56 N. W. Rep. 824.

210. TENANTS IN COMMON.—A bill by one tenant in common against his cotenant for an accounting for rents and profits, which does not show that the defendant received any rents, and does not state the rental value of the land, and merely shows occupancy by the defendant and forbearance to occupy by the complainant, is fatally defective.—ANGELO v. ANGELO, Ill., 35 N. E. Rep. 229.

211. TOWNS—Limit on Bonded Debt.—Const. art. 9, § 17, providing that no bonded debt incurred by a county or municipality shall exceed 8 per cent. of the assessed value of the taxable property therein, appoints as standard the last tax assessment before the bond issue, and no subsequent assessment is material.—STATE v. CORNWELL, S. Car., 18 S. E. Rep. 184.

212. TRESPASS QUARE CLAUSUM FREGIT.—Plaintiff having bought a strip of land from defendant, an adjoining land-owner, defendant ran it off, and erected a building on the line. Afterwards, plaintiff claimed that the line so run was incorrect, and that the true line was several inches within the line of the building: Held, as a matter of law, that plaintiff had either actual or contsructive possession, so as to support an action of trespass *quare clausum fregit*, and it was error to leave the question of possession to the jury.—WILKINSON v. CONNELL, Penn., 27 Atl. Rep. 870.

213. TRIAL—Misconduct of Counsel—Waiver.—Where a party objects to the misconduct of opposing counsel, and the court does all in its power to relieve him from the effects of such misconduct, he is deemed to have waived all questions arising out of the misconduct if he does not move to set aside the jury or take other steps to secure a fair trial.—MABIN v. WEBSTER, Ind., 35 N. E. Rep. 194.

214. TRIAL—Right to Open and Close.—The administrator of an estate, who does not file an answer in an action on a claim against the estate, but rests on the issue formed by the general denial, which, under Elliott's Supp. § 391, he is not required to file, can afterwards waive the issues thus formed, admit the truth of the complaint before the introduction of evidence by plaintiff, assume the burden of the issues, and thus secure the right to open and close. — MCCLOSKEY v. DAVIS, Ind., 35 N. E. Rep. 187.

215. TRUSTS — Innocent Purchaser. — Land was conveyed to a married woman and her heirs in trust for the use of herself and her husband during their lives, and, upon the death of both, "to convey said property in fee-simple, by good and sufficient deed," to her children: Held, that the trust, being imposed on both the woman and her heirs, was valid, and capable of execution by deed from her heirs after the death of herself and her husband.—HAGAN v. VARNEY, Ill., 35 N. E. Rep. 219.

216. TRUST—Resulting Trust.—Where land in which a married woman had an interest is conveyed by her to a third person, and from him to her husband, both deeds being expressed to be for valuable consideration, and the husband retains possession of the land for 43 years, claiming title without dispute from his wife, a resulting trust in her favor will not be decreed at suit of her heirs after her death, when the only evidence in support of such trust is testimony as to admissions alleged to have been made in casual conversations many years before the trial.—FRANCIS v. ROADES, Ill., 35 N. E. Rep. 232.

217. VENDOR AND PURCHASER — Contract. — Where a deed has been accepted as full performance of an executory contract to convey real estate, the contract is merged in the deed, upon which alone the rights of the parties thereafter rest; and, in case the deed contains no covenants, and there be no ingredient of fraud or mistake of fact, the grantee cannot recover back the consideration paid because of failure of title.—SLOCUM v. BRACY, Minn., 56 N. W. Rep. 826.

218. VENDOR AND PURCHASER — Failure of Title. — Defendants, in platting their land for a town site, by mistake left out a part, and included land belonging to others. They afterwards conveyed certain lots of the proposed town site to plaintiff by warranty deed, some of which were on the land included by mistake: Held, that on failure of title to such lots, plaintiff was not entitled to have other land of defendants set aside to it, but should look to the covenant of warranty for money compensation.—WILLBARGER COUNTY v. ROBINSON, Tex., 23 S. W. Rep. 824.

219. VENDOR AND PURCHASER — Lien — Mortgage.—S conveyed land, subject to a mortgage, to plaintiff by, absolute deed, as security for a debt. Plaintiff renewed the mortgage, and afterwards, without having his debt paid, reconveyed it to S, who was to sell it, and pay plaintiff. S conveyed it to his wife, and she conveyed it to D, who had no notice of any vendor's lien on the land. All the conveyance were subject to the mortgage given by plaintiff: Held, that plaintiff was not entitled to a vendor's lien on such land.—WENZEL v. SCHULTZ, Cal., 34 Pac. Rep. 696.

220. VENDOR AND PURCHASER—Unrecorded Deed.—At the time of plaintiff's purchase of the land in suit, defendant had title thereto by a deed which was not recorded, and possession of the land was held by one who had leased it from defendant by a lease, the term of which had expired. This lessee took possession before he obtained title under defendant's lease, and had exclusive possession down to the time of suit; and though, since the expiration of the lease, he had paid no rent, he had not notified defendant that he refused to hold as her lessee. Plaintiff had no knowledge of any adverse claim to the land, but failed to inquire if any one was in possession: Held, that the lessee's possession operated as constructive notice of defendant's claim. — LEAGUE v. SNYDER, Tex., 23 S. W. Rep. 822.

221. WILL—Ademption.—After execution of a will in which the testator bequeathed his daughter $3,000, she requested him to advance her her share of his estate at once, she to pay interest thereon during his life. Accordingly he paid her $3,000, for which sum she gave her note, "to run during my natural life:" Held, that the note constituted an ademption of the legacy, it being shown that the provision for payment at the maker's death was a mutual mistake of fact.—HAYWARD v. LOPER, Ill., 35 N. E. Rep. 225.

222. WILL — Powers — Execution. — E M, by second clause in her will, devises her property equally to P M, Catherine F, and P M, trustee for the separate use of Harriet M for life, remainder to her children, and in default of issue with power of appointment, and in default of appointment to said P M and Catherine F. Harriet died, leaving said P M and C F surviving her. She made a will, disposing of her whole estate, but made no mention either of the power above or of the property derived under E M's will. Her will contained a general residuary clause: Held, that under section 2526, Code 1887, providing that a bequest shall operate as an execution of a power, there was a sufficient appointment under the power conferred in E M's will.—MACHIR v. FUNK, Va., 18 S. E. Rep. 197.

223. WITNESS — Transaction with Decedent.—The statutory rule that parties and persons directly interested in an action are precluded from testifying therein of their own motion, where the opposite party sues or defends as an administrator, etc., is not applicable in favor of one who is not sued as administrator, and who does not, by his answer, defend as such.—PREWITT v. LAMBERT, Colo., 34 Pac. Rep. 683.